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CASES

ARGUED and DETERMINED,

IN THE

High Court of Chancery,

IN THE TIME OF

Lord Chancellor HARDWICKE,

From the YEAR 1746-7, to 1755.

With TABLES, NOTES, and REFERENCES.

By FRANCIS VEZEY, LLD.

BARRISTER at LAW.

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MVSEVM
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CASES

CASES

Argued and Determined in the TIME of

Lord Chancellor HARDWICKE.

Lord Townſhend *verſus* Windham, July 13, 1750. Caſe 1.

THIS bill was by the creditors of *Joſeph Windham Aſh* for an account and ſatisfaction out of his aſſets, and to have the ſeveral claims of the defendants diſcuſſed.

The firſt claim was by *John Windham*, executor and ſon-in-law of the teſtator, as creditor by judgment in two inſtances: the firſt to ſecure to him payment of 5000*l.* the portion of his wife, the teſtator's daughter; the other was given by way of ſecurity for the balance of an account, ſtated with *John Windham* by the teſtator in 1746. about eleven days before his death.

The next claim was by *Catherine Windham*, the teſtator's daughter. He being intitled to a very large eſtate for life, remainder to his firſt and every other ſon in tail male, remainder to his nephew *William Windham* in tail, with limitations over, and having only daughters, no ſons, nor a probability of any, in 1734. after the marriage of *William*, executed an indenture of demiſe in performance (as it ſet

forth) of certain promiſes and agreements made by teſtator before the marriage; and in conſideration of natural love and affection to his nephew he let him have poſſeſſion immediately of part of his eſtate, without paying any thing for it; but *William* thereby covenanted, that if by teſtator's death without iſſue male it ſhould happen, that *William* or any of the heirs of his body ſhould come into poſſeſſion of this eſtate, he would permit ſuch perſon, as the teſtator ſhould by deed or will in his life-time appoint for that purpoſe, to enter and receive the rents and profits of the eſtate for ſo long a time, as *William* ſhould enjoy it in the teſtator's life. In 1742. the teſtator by a deed directs all and ſingular the lands, tenements, manors, and hereditaments, and all his eſtate, title, right, and intereſt, to *St. Comyns*, his heirs, executors, adminiſtrators, and aſſigns to take the rents and profits thereof from and immediately after death of teſtator, in truſt nevertheleſs to and for the ſole and ſeparate uſe of *Catherine*, her heirs, executors, and adminiſtrators; and died in 1746.

The queſtion was, whether this twelve years intereſt in *William*'s eſtate was part of the aſſets of teſtator, or a good appointment to his daughter?

For plaintiffs: This is part of his perſonal aſſets; a general power is ſo conſidered in this court, if executed without valuable conſideration (let it be to whatever perſons, or uſes) becauſe it is that over which he has an abſolute property, and ſhall not therefore give away from his creditors after his death: if it is to limit only to particular perſons or uſes; that, when exerciſed, is not aſſets; becauſe to a particular uſe. *Laſcelles* v. *Lady Cornwallis*, 2 *Ver.* 465. *Pre. Chan.* 232. but more preciſely laid down in ſeveral ſubſequent determinations, the ſtrongeſt of which was *Shirley* v. *Lord Ferrers*†; where, though appointed to a daughter, it was held aſſets; becauſe it was a general power over 5000*l.* and no more valuable conſideration as to this appointee, than there. In *Bainton* v. *Ward*, 20 *April* 1741. *Geo. Ward*, having power by deed or will to charge the premiſſes with any ſum not exceeding 2000*l.* by will taking notice thereof, deviſes to his mother 500*l.* to the plaintiffs 1000*l.* to his wife the other 500*l.* with the reſidue of his real eſtate, making her executrix, charging according to his power. *Your Lordſhip* held, that being a general power to raiſe the money as he pleaſed, it was part of his perſonal eſtate in reſpect of the general creditors, notwithſtanding he had appointed to particular perſons; who could only take as ſpecific legatees to have the other perſonal eſtate firſt applied; and that *Shirley* v. *Lord Ferrers* was in point. No power can be more general than the preſent, as to perſons and uſes; and he might have ſold or mortgaged this property, though he could not actually enjoy it in his life: if no appointment, it would have gone to the general aſſignees at law of teſtator; the old ownerſhip reſulting.

† At present I can't find where this case is reported. The case in 3. P. Wms & Mosel. of this name is on a diff. point.

X. L. 2.

Ath. 172.

For defendant *Catherine:* This being to ariſe on a contingency after teſtator's death, there are no words in the conveyance reſerving the eſtate to him, nor of covenant to his executors, but merely to ſuch as he ſhall appoint; which alone makes it different from the caſes cited. If no appointment, it could not devolve on his repreſentatives. Tenant for life with power to charge with 100*l.* becoming bankrupt, Lord *King* held it was merely a power, not ſuch an intereſt as would paſs to the aſſignees. But ſuppoſing it might be called his eſtate by his power of appointment, it will not fall under thoſe caſes, becauſe he determined his power in his life, and could make no ſubſequent appointment. It was the ſame, as if he had given ſo much money to his daughter, appointing the benefit of it to her immediately on the contingency. In all the caſes there was a ſubſiſting eſtate in the party; in this the whole is paſſed away. One, though indebted, may diſpoſe of part of his perſonal eſtate to a child. If there is no authority in point, this is the ſevereſt caſe to make one: it was long before the court would determine the truſt of terms for years to be aſſets; though now, this court following the law, it is ſo. Here the daughter may be ſaid to be a creditor; as it cannot be made aſſets in point of law, ſo that they muſt come here, the court will not act at all, nor take this away in ſo hard a caſe from a daughter otherwiſe unprovided for. It is to be conſidered as if an action was brought, and whether within the ſtatute of *Elizabeth*, as made through fraud to retard recovery of debts; nothing of which is here; for if the original deed is not fraudulent, the derivative cannot be ſo. 2 *Bul.* 218. There is no ſuſpicion from the ſituation of teſtator or his daughter, or the tranſaction itſelf; he not continuing to receive the profits, nor retaining poſſeſſion, nor a power of revocation, nor made without intervention of a third perſon; nor could the creditors affect it, if no appointment was made at all. It is only a contingent intereſt, not forfeitable for treaſon: the ground of the claim is, that the court will decree execution of the power if the appointment was out of the caſe; but it falls not within the rules to decree ſuch a power as this. There is a difference between a non-execution and a defective execution; nor are powers of equitable juriſdiction, unleſs as it is a better remedy. In *Laſcelles* v. *Lady Cornwallis* the money was actually raiſed, and *in tranſitu* the court will lay hands on it, when it comes into executors hands, having all the quality of aſſets. If this appointment had been executed by will, it might be aſſets, having all the qualities of a will; but being by deed, has all qualities of a deed; it is irrevocable, no lapſe, *&c.*

The next claim was by defendant Mr. *Pratt*, to a particular kind of ſecurity on certain arrears of rent and dividends, due at teſtator's death, under a deed executed by teſtator, 17 *Dec.* 1745.

Prat

Prat was a conſiderable creditor of teſtator, ariſing on a breach of truſt upon not having accounted with him for the reſiduary eſtate of his uncle; which debt amounted to 6472*l.* and by the ſaid indenture the teſtator aſſigned to *Comyns*, his executors, *&c.* for 21 years, if the teſtator ſhould ſo long live; from *Chriſtmas* then next, on truſt to receive the rents and profits of his eſtate, and dividends that ſhould ariſe on his funds, and to pay thereout particular inſtalments of 1500*l.* *per ann.* to *Prat*, toward ſatisfaction of that debt, and afterward for the teſtator; but if the teſtator died before the whole ſum was paid, by this particular proviſion, the truſtee ſhould ſtand intruſted to apply the reſt and reſidue of the dividends, rents, and profits of the eſtate and funds, that were due at making the aſſignment, and that ſhould accrue due after the time of making the conveyance, toward ſatisfaction of the reſidue of the debt. It was inſiſted, he was intitled to whatever arrears were due, as veſted in his truſtee for him; for that thoſe, which were not received by teſtator, were no part of his perſonal aſſets: that this was a covenant on contingency; and being the caſe of a perſonalty, it was not like land, where a preciſe form is neceſſary to give a right; and there was a caſe before Sir *Joſeph Jekyl* of a covenant to pay out of a chance, arrears which ſhould ariſe at his death.

For plaintiffs the aſſignment was not diſputed, ſo far as it took place as to the 1500*l.* *per ann.* but as to the arrears due at and after the aſſignment over and above the 1500*l.* it reſted merely on the covenant: there was no aſſignment thereof; nor to take place againſt general creditors; not creating a ſpecifick lien for the ſecurity. But if it ſhould be conſidered as an aſſignment, it is of ſomething ſo uncertain, as to convey no right; leaving it in the debtor's power to receive this fund as he pleaſed. It is ſaying, if I do not ſpend theſe arrears you ſhall have them; but none can ſay, that at his death one ſhall be paid out of his aſſets before the other creditors; there muſt be an actual aſſignment for that, and the abſolute property not to be kept in himſelf till then. None can covenant to alter the order of diſtribution. He had power to ſpend or aſſign it, and no limitation over after an abſolute property can be good; nor will the court ever give ſuch a priority in an inſtant as to cauſe inequality or a loſing fund for aſſets.

Another claim was by the widow of ſome jewels as her *paraphernalia* given by her huſband; and further, that a real eſtate being left to truſtees (of which her huſband was one) to her ſole and ſeparate uſe, he entered, and for ſeveral years received the rents and profits, and ſpent them without paying over any part to her ſeparate uſe; and therefore ſhe ought to retain the jewels.

For

For plaintiffs: ſhe cannot retain *paraphernalia* againſt creditors, though the court will help her by marſhalling aſſets, if there are other funds. She can at moſt be but a ſimple contract creditor; and it will be preſumed, ſhe conſented to his receiving her ſeparate eſtate, as in the caſe of pin-money.

LORD CHANCELLOR.

The relief ſought is the general and common relief; and ſo is the decree. The only queſtions are made on the particular points in the cauſe, either to extend or reſtrain the quantum of theſe aſſets liable to payment: whether any are intitled to retain by way of ſpecifick lien or preference, or whether as general aſſets they are to be applied for all the creditors in common courſe of adminiſtration?

The firſt queſtion is not in reſpect of a ſpecifick lien, but a preference; and it is clear, that *John Windham* is intitled to that right and preference ariſing on articles previous to marriage (which is the beſt conſideration, that can be) for that ſum is ſecured by the firſt judgment. As to the other judgment, the account is only proved by the ſignature of the parties; but it appearing to be an account ſtated between father and ſon in law (who are called in another law conjunct and confident perſons) on which ſome ſuſpicion ariſes; and it not being verified, that there are any debts due; and there being ſome extraordinary items, the Maſter muſt look into that account, and the judgment confeſſed muſt ſtand as a ſecurity, on what ſhall appear due on the balance; and for that he will have a preference, and it will follow of courſe, that he may retain as executor.

Tenant for life aſſigns rents and dividends for 21 years in truſt to pay a debt by inſtalments, and if he died before payment, the arrears due at and after, ſhould be ſo applied; a ſpecifick lien on the arrears for that debt, and they are not part of the general aſſets

The next point (at leaſt as I ſhall take it, being clear in my opinion) regards the defendant *Prat*. The teſtator was only tenant for life of his eſtate, and of particular funds aſſigned which were real eſtate, and of orphan and *South*-ſea ſtock, only to receive for life out of them all; and could therefore make a ſecurity only on the rents and profits which ſhould accrue during his life, and ſo on the dividends and funds. Something ariſes on the nature of the ſecurity made; being as to the real eſtate a conveyance of an eſtate *pour auter vie* to the truſtee in truſt; ſo alſo are the ſtocks aſſigned: but as to the lands, the eſtate paſſed in the lands. The parties had this in view; the creditor ſaw, he had no intereſt in this longer than the teſtator's life, who appears then to have been in a bad ſtate of health, and died the *July* following, ſo that he had reaſon to ſay, it was a precarious ſecurity, if he was to depend abſolutely on the 1500*l.* payment during teſtator's life, and therefore agrees upon that further advantage. No caſe of this kind ever came before the court; but it

it ariſes in the caſe of a very fair and juſt creditor for valuable conſideration; ſo that, unleſs there is a ſtrong reaſon or authority againſt it, I will ſupport it as far as I can, and here the plaintiffs, who are creditors, combat with a creditor. It is no more, as this was to ariſe at teſtator's death, than a covenant to give a particular preference to one creditor before another out of part of the general aſſets of the debtor. The general reaſoning is right, that no debtor can by will or other act give another creditor a preference, different from what the rule of law or equity would, before the reſt, out of his general aſſets; but the queſtion is, whether that will lie in the preſent caſe? Firſt, as to there being no aſſignment, a diſtinction ariſes there between the arrears due before this conveyance made, and ſuch as became due after making the aſſignment. As to the latter, the eſtate itſelf is aſſigned; therefore as to the rents and profits and dividends accruing, after the aſſignment made the intereſt in them, (though it can hardly be called the legal intereſt in the dividend of the ſtock) but as to the profits of the land, the legal intereſt was veſted in truſtees, and this covenant muſt be taken as a declaration of the truſt of that, for benefit of *Prat* the creditor. The queſtion next ariſes on ſuch of theſe arrears as were not formerly aſſigned, but reſt merely on the covenant; that is, ſuch as were due at the time of making the aſſignment: and it is to be conſidered whether this covenant does not amount to an aſſignment in equity, being for valuable conſideration? and I am of opinion it does. In equity a choſe in action may be aſſigned for valuable conſideration, and that covenant being for valuable conſideration, this court will conſider, as if it had been done, and as an aſſignment of the thing itſelf. There are ſeveral inſtances where covenants of choſes in action are conſidered as aſſignments; often in the caſe of lands, as was the great caſe of Lord *Coventry*. A covenant therefore for valuable conſideration will operate in this court as an aſſignment. Then as to the objection from uncertainty, leaving it in the power of the covenantor to receive or to diſpoſe of it. In this court it is in the power of a man to prefer one fair and juſt creditor before another, and there may be juſt reaſon to do it from the nature of the debts and demands; and there can hardly happen a ſtronger caſe where it is incumbent on a man to provide for the payment of a debt, than this. None can prefer one creditor by covenant out of his general aſſets, but he may lay hold ſpecifically of part of his aſſets, and that though it is to become part of his eſtate after his death, or *eo inſtante* part of his aſſets; as he may aſſign *bottomry* bonds, or policies of inſurance, or any intereſt, without any objection from being a contingency, which may be aſſigned as well as any thing elſe. Suppoſe it was an *intereſſe termini* not to take place until after his death, he might aſſign it without its being ſaid to interrupt the courſe of adminiſtration. I am of opinion upon this covenant he could only receive the money, but he could not aſſign it *de novo* by notes on the tenants, ſo as to defeat a prior aſſignee

Debtor cannot prefer one creditor out of the general aſſets, but may ſpecifically lay hold of part for that, tho' a contingency.

Choſe in action aſſignable in equity for valuable conſideration, and the covenant operates as an aſſignment.

or

or covenantee. But, conſider to what this is applied, it ariſing from the nature of the thing, from the ordinary courſe of payment of the rents and profits, not upon the intent to leave it fraudulently in the debtor's power to receive or not; and for that a letter written by the teſtator to the truſtee will be material, the meaning of which letter was, that there would be, whatever induſtry uſed, a great arrear in the hands of the tenants, and he would aſſign the benefit of that arrear, in caſe of death before the debt paid by the 1500*l. per ann.* There was no unfairneſs in this; nor is there any rule of law or equity, that a man may not make an aſſignment to a real creditor for valuable conſideration of ſuch arrears, as ſhall be due at his death upon ſuch a particular farm. What reaſon is there for a court of equity to ſet it aſide, unleſs ſome apparent intention to leave it in the power of the teſtator to do otherwiſe with it. That aſſignment therefore will take effect as to the 1500*l. per ann.* and the arrears due at making the aſſignment, and afterward over and above, (although I fear they will fall greatly ſhort of paying the debt) and they are not part of the general aſſets.

No paraphernalia where huſband dies indebted, but court will let wife in on other funds, if any.

As to the *paraphernalia*, the rule of law is, that where the huſband dies indebted, the wife is not intitled thereto. In *Cr. C.* there is a caſe that the wife was intitled only to one gown. This court has gone in a more favourable rule, and reaſonably ſo, to let the wife in upon other funds: but there is no other fund here upon which ſhe can come at it, unleſs this, as a creditor for the arrears of her ſeparate eſtate received by her huſband, who was indiſcreetly made one of the truſtees. But ſhe muſt be a creditor by ſimple contract, and as the eſtate comes out, that would not help her much.

Wife a creditor only for one year's arrear of pin-money.

As in the caſe of pin-money, a wife ſuffering her huſband to receive the rents and profits of her ſeparate eſtate, cannot come for it afterward, and is allowed only to come in as a creditor for one year's arrear of pin-money; the ſame holds as to this. But it is ſaid, he bought jewels, and if the huſband in poſſeſſion of the rents and profits of her ſeparate eſtate bought and gave to her the jewels, I ſhould take it the equitable conſtruction would be, that it was like paying her the money of her ſeparate eſtate: if indeed he bought them before he was in receipt of her eſtate, it would not do certainly. I cannot follow the money to be ſure. She is not intitled to retain theſe jewels as her *paraphernalia*, unleſs there ſhould be any after payment of the debts; but let the maſter enquire at what time the huſband came into poſſeſſion of her ſeparate eſtate, the yearly value thereof, and alſo whether he gave her any and what jewels, while he was ſo in receipt, at what time given, and their value?

So for her ſeparate eſtate received by huſband.

I own, as to the other part of the caſe relating to *Catherine Windham*, I am in doubt. This court has certainly (and it is its office) extended the remedy of creditors as far as conſiſtent with juſtice;

and the caſes have gone a great way on that. I have generally taken it, that *Shirley* v. Lord *Ferrars* went farther than the former caſes; but as it was an authority of Lord *Talbot*'s, and in favour of creditors, I have followed it ſince, but ſhould not be willing to go farther than that; nor am I quite ſatisfied that this falls directly within it. I do not know but this may be an intereſt in the land itſelf, and then that authority is out of the caſe. But I have not formed an opinion, and will look into the caſes and authorities. It may be a hard caſe upon her, ſhould it be againſt her, but I muſt not make a precedent that men may make a proviſion for their families in prejudice of creditors.

His Lordſhip delivered his opinion *July* 16, 1750.

Tenant for life, remainder to his ſons in tail, remainder to his nephew, lets in the nephew immediately on his agreeing to permit his uncle's appointee to receive the rents for ſo long as the nephew enjoyed in his life. Uncle lives 12 years, and being in debt appoints to his daughter this intereſt, in part of his general aſſets for creditors.

The general queſtion is, whether the defendant *Catherine* is intitled in this court to retain the appointment made to truſtees for her benefit out of the eſtate of *William Windham*; or whether that intereſt or power that had been acquired by the teſtator, is, notwithſtanding that particular appointment, to be conſidered as part of the general aſſets of the teſtator? To determine this it muſt be conſidered, what is the nature of the intereſt or power the teſtator had in that part of his eſtate. It ariſes on a very particular tranſaction; ſuch as there is not a likelihood of another of the kind: but as to this queſtion, it will depend on the general rule; and whatever inclination one might have to preſerve the benefit of a tranſaction of this kind to a daughter, ſaid to be left unprovided for, (though there is no proof of that) it muſt not be done ſo as to break in upon principles and rules eſtabliſhed, which would be perilous in future inſtances. The teſtator had a mind to do ſomething for his nephew in his life; yet not abſolutely without leaving it by way of retribution. The nephew's intereſt in the eſtate was a remainder in tail, expectant upon an eſtate for life in the teſtator, ſubject to let in the contingent remainders to his ſons, if there ſhould be any. The method taken was this, to let the nephew into poſſeſſion of part of this large eſtate immediately, not paying any thing for it; but if he or any heirs of his body happened to come into poſſeſſion of the eſtate upon the teſtator's death, the teſtator ſhould have power of taking back ſo much of the eſtate for ſuch perſons, as he ſhould appoint, for ſo long a time as *William* ſhould enjoy it in the teſtator's life; it was an uncertain term, and uncertain profits. The teſtator intended to make a proviſion for his daughter out of it, as part of her fortune, and for her preferment, which he does in truſt for her ſeparate uſe. It is inſiſted for the plaintiffs, that this is ſuch a kind of intereſt granted, as the teſtator would be intitled to the benefit of, although he had made no particular appointment; but on conſideration I am of opinion, that without making a particular appointment, neither he, nor any in his place, could have had any benefit of this covenant;

nant; for, taking it in any light, it muſt be conſidered as a covenant or grant of the intereſt in the land. Perhaps it partakes of both; but conſidering it as a covenant, what action of covenant could have been maintained by the executors of the teſtator upon this deed, until appointment made by the teſtator? The very words ſhew there could be none. Conſidering it in another light, as a grant of the intereſt in the land, it was ſuch, as could not take effect until he made an appointment; for until then there was really no grant. If there had been a perſon named appointee in the deed, as if it was to deliver poſſeſſion, and let any other particular perſon receive the rents and profits, I ſhould have been of opinion, that this had operated not barely as a covenant, but as a grant or kind of demiſe of the term or chattel intereſt to take effect in poſſeſſion out of his remainder in tail, when that remainder took effect in poſſeſſion: and that has been determined in ſeveral inſtances; that though it is by way of covenant, it operates the other way; which was Lord *Montjoy*'s caſe in 4 *Leo.* p. 147. ſo in 3 *Leo.* ~~305~~ caſe 295, in *Pollexfen*'s time, that it was a grant of a way, not operating as a covenant. But here no perſon was named at the time: but when the teſtator came to execute the power, and nominate an appointee, then it became complete, and operated as a grant of the land for that chattel intereſt, to take effect out of his remainder in tail from that time; and, like all other powers where there is a conveyance of an eſtate to ſuch uſes, as another ſhall appoint, when appointed it takes effect out of the original grant. This being the nature of the intereſt granted, it falls in with the intent of the parties; which was not on either ſide, that that in all events the uncle ſhould take ſo much out of the nephew's eſtate, as the nephew had the benefit of out of his eſtate for life. If that was the meaning, they would not have put it in this ſhape, but made it ſo directly; but the meaning was to leave it in the uncle's power or option to make uſe of it or not; for perhaps his circumſtances might be ſuch, as he would have no occaſion to do it. The next conſideration is, ſuppoſing this was not ſuch an intereſt as could take effect until the power was executed, and that without particular appointment the executors of the teſtator could have no benefit, whether this differs from the other caſes on the execution of general powers, where executed by the party; as *Shirley* v. Lord *Ferrars*, and others, which have eſtabliſhed the doctrine, that where there is a general power of appointment of a ſum of money to charge the eſtate of a third perſon, which it is abſolutely in his pleaſure to execute or not, he may do it for any purpoſe whatever, and appoint the money to be paid to himſelf or his executors, if he pleaſes. If he executes it voluntarily without conſideration, for benefit of a third perſon, this ſhall be conſidered as part of his aſſets, and his creditors have the benefit of it. Nor does it differ, whether it is a power to charge a ſum of money on land, or to create a chattel intereſt out of land; for it will depend on the ſame foundation, provided it is a general

A covenant may operate as a grant.

General power of appointment executed voluntarily; aſſets, though to a daughter. See 2. Atk. 272.

neral power, which he may execute for any purpoſe; for if it is a power to appoint a ſum among other perſons, who are at all deſcribed by the power, ſo that it is not abſolutely in his power to do it for himſelf, there is no pretence that his creditors could have the benefit of it. Conſider how the preſent differs from any of thoſe caſes; and notwithſtanding I have endeavoured to find a difference, I do not ſee a ſubſtantial one to ground a different rule upon in point of juſtice. The rules of this court are eſtabliſhed as far as they can, in favour of juſt creditors, and to prevent perſons having powers from diſpoſing thereof voluntarily to defeat creditors; and the court has extended it of late: and though an unfortunate caſe may ariſe in the caſe of children, for whom parents are bound by nature to provide, it is impoſſible to ſay, the conſideration in reſpect of them is of ſo high a nature as that of paying juſt debts; and therefore the court never preferred them to juſt creditors, who might otherwiſe be defeated of a ſatisfaction for their debts. On that ground was *Shirley* v. Lord *Ferrars*, which has been allowed ever ſince, and is agreeable to *Laſcelles* v. Lady *Cornwallis*. A diſtinction was endeavoured, that the appointment by Lord *Ferrars* was by will, this by deed; becauſe whoever takes by will, takes as a legacy; but that is not a material diſtinction; for if eſtabliſhed, the juſtice intended by the court in theſe caſes would be avoided in every inſtance; as then it would be putting it barely on the form of the conveyance, and elude the rule of juſtice. Nor is there any ſubſtantial ground for this diſtinction; for if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpoſe, but as an appointment; not as an appointment of his own aſſets, but of the eſtate of another, and takes not place by force of the will; it is therefore a ſlight and ſhadow of diſtinction only. Then conſider the reſult. This is rather ſtronger in favour of creditors, than thoſe caſes where there has been barely an appointment of ſums under a power; this appointment operating as a conveyance of the chattel intereſt in the land to *Catherine Windham*, to truſtees for her benefit, the teſtator being indebted at that time. If ſo (and ſo it is taken by the drawers of the deed) how does it ſtand on the foot of the ſtatutes? There is no caſe, where a perſon indebted makes a conveyance of a real or chattel intereſt for benefit of a child without the conſideration of marriage or other valuable conſideration; and dying indebted afterwards, that that ſhall take place. There is certainly a difference between the ſtatutes of fraud, of the 13 *Eliz.* which is in favour of creditors, and the 27th *Eliz.* which is in favour of purchaſers. But that difference was never ſuffered by way of general rule to go farther than this: on the 27th *Eliz.* every voluntary conveyance made, where afterward there is a ſubſequent conveyance for valuable conſideration, though no fraud in that voluntary conveyance, nor the perſon making it at all indebted, yet the determinations are, that ſuch mere voluntary conveyance is void at law by the

Voluntary conveyance, though no fraud, void againſt ſubſequent purchaſe for valuable conſideration, and alſo againſt creditors, if indebted at the time. But if to a child, and no fraud, good againſt ſubſequent creditors.

ſubſequent purchaſe for valuable conſideration. But the difference between that and the 13th *Eliz.* is this; if there is a voluntary conveyance of real eſtate or chattel intereſt by one not indebted at the time, though he afterward becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud ſubſequent creditors, that will be good; but if any mark of fraud, colluſion, or intent to deceive ſubſequent creditors appears, that will make it void; otherwiſe not, but it will ſtand, though afterward he becomes indebted. But I know no caſe on the 13th *Eliz.* where a man indebted at the time makes a mere voluntary conveyance to a child without conſideration, and dies indebted, but that it ſhall be conſidered as part of his eſtate for benefit of his creditors; and on that foundation, I take it, this court has grounded their opinion in the execution of powers, when they ſtop *in tranſitu*, (as it is called) and ſays, it ſhall not be given away from creditors; therefore I am not warranted to do otherwiſe. There is a caſe ſhewing the ground and reaſon of this at law, and that this is conſidered as part of the eſtate of the teſtator at the time of his death, *viz.* 2 *Rol. R.* 173. It was an odd caſe; one hardly knows how it came in queſtion. A man actually indebted, and conveying voluntarily, always means to be in fraud of creditors, as I take it. Here the teſtator had a power to appoint the benefit of the covenant, or in the other light this chattel intereſt in the land, to take effect out of the remainder in tail, generally to any perſon, or to take it to himſelf: he appoints it not to himſelf, but merely voluntarily to a daughter to take effect after his death, as it could not be otherwiſe: in reſpect of his creditors it muſt be conſidered as part of his eſtate at the time of his death; he having executed it ſo as to gain the intereſt to himſelf, and attempted to paſs it at the ſame time to his daughter: the court will not ſuffer it; ſaying he has been guilty of a fraud as to them, being indebted at the time. This is an unfortunate caſe; but I cannot help it; for I muſt not lay down a rule, which will make the rights of creditors precarious.

I muſt therefore declare, that ſhe cannot have any ſpecifick lien upon this fund, unleſs any ſurplus after debts; which, I fear, will be nothing: but the teſtator being indebted at the time of making the appointment, it is void as againſt his creditors; for whoſe benenefit, whatever ariſes by that deed out of the eſtate of *William Windham*, ought to be conſidered as part of the general aſſets of the teſtator: and if a recovery has not been ſuffered to make good this intereſt out of this eſtate, I ſhould think *William Windham* would be bound to do it, for the heirs of his body would not be bound, if he did not, and left no aſſets.

Boughton

Caſe 2. Boughton *verſus* Boughton. July 18, 1750.

A Freeman of *London* deviſed his real eſtate to his younger ſon *Stephen Boughton*; and all his perſonal eſtate among his children; among the reſt 1200*l.* upon ſome contingencies to *Grace*, the daughter of his eldeſt ſon; adding this clauſe, "If any child or children of mine, or any in their right, or any who may receive benefit by my will, ſhall any way litigate, diſpute, or controvert the whole or any part thereof, or the codicils thereto belonging, or not give ſuch diſcharges as my will requires, or not comply with the whole, and all and every condition and conditions therein contained, both as to real and perſonal eſtate, ſuch child or children, ſo far as it relates to them ſeverally, ſhall forfeit all claim and pretence whatever under my will, and ſhall have no more than the orphanage part of the perſonal eſtate I die poſſeſſed of; revoking what I gave to them, I give it to my reſiduary legatees."

Contingent legacy to heir, and expreſs condition not to diſpute the will; which is not executed according to the ſtatute: Heir put to election when of age, to claim the legacy or the lands deviſed away.

See P. Ves. Jun. 492. & 12. do. 210.

The teſtator underwrote to this inſtrument an atteſtation in the common form; but it was not ſubſcribed by him, nor did any witneſs ſubſcribe it at all.

There was a codicil without date; but ſigned by him; therein taking notice of and reciting, that in further conſideration of this his laſt will he makes a codicil thereto, and gives directions therein.

Grace, by the death of her father happened to become heir at law to her grandfather, and ſo intitled to whatever he left to deſcend, or ought to deſcend from the invalidity of his diſpoſition.

She being an infant of tender years, this bill was brought by *Stephen*, in order that ſhe might make her election, whether ſhe would have the 1200*l.* or the land which happened to deſcend to her; for that ſhe could not claim both; but, if ſhe choſe the legacy, muſt let the real eſtate go according to the intent; and that on the general reaſoning and foundation of the court in *Noys* v. *Mordaunt*, in *Streatfield* v. *Streatfield*, *Talb.* 176. and in *Jenkins* v. *Jenkins*, *Nov.* 20, 1736, where Lord *Talbot* put the party to his election upon an implied condition to be added tacitly to the teſtator's bequeſt whereas here an expreſs condition is annexed.

For defendant *Grace*: The queſtion is, Whether by taking benefit of the deſcent ſhe breaks the condition, on which the contingent legacy of 1200*l.* is given? For ſhe certainly muſt take it in the form

given, whether the condition is expreſſed or implied; which is the ſame, becauſe it is implied on evidence of teſtator's intent, which may be without expreſs words; ſo that where different parts are given to different perſons, it is implied, that no one who does not comply with the whole ſhall receive benefit from any part; which was the foundation of *Noys* v. *Mordaunt*, and ſeveral other caſes. To ſhew that defendant breaks this condition by taking the real eſtate, it muſt be ſhewn, that by the will the eſtate is deviſed to other purpoſes, and that ſhe does not ſuffer it to go according to the will. It muſt firſt be eſtabliſhed, that there is a will made; and next, what is the meaning of it. The condition is to abide by the whole will; but there is no will as to the land, any more than if by word of mouth; the probate cannot be read to ſhew the real eſtate deviſed; nor this writing to a jury, if an iſſue ſhould be directed to try whether he deviſed theſe lands, the inſtrument failing. This is not like the caſe, where teſtator gives perſonal eſtate on condition to convey a real eſtate; there the condition muſt be performed; here the condition is, that his will ſhould be performed; the conſtruction of which is, his will ſo far as it is valid and executed properly. She does abide by the will ſo far; for there is no will as to the real eſtate. This is not a want of power in teſtator; and all the caſes go to his doing that which he had no power to do. *Herle* v. *Greenbank*, *Auguſt* 3, 1749. (where this came ſolemnly under conſideration) is exactly the ſame as the preſent, only there the condition was implied, here it is expreſſed; and your Lordſhip there would not put the party to election, there being no will as to the land. But it is impoſſible this election can be made for the infant before her coming of age; for the gift depends on ſuch contingencies, that there is no rule for the court to go by, to know what is for her benefit. Ante.

LORD CHANCELLOR.

I am ſatisfied, the infant ought not to take the benefit of this perſonal legacy, without at ſome time or other waving any right to theſe lands claimed by deſcent; and that it is very different from *Herle* v. *Greenbank*. The teſtator made one inſtrument; in which he has uſed words, expreſſions and clauſes, relative both to real and perſonal eſtate; and in it is contained a clauſe importing in words, though not by force of the inſtrument, to be a deviſe of the real to the plaintiff, gives 1200*l.* to his grandaughter; and has taken upon him to diſpoſe of his whole perſonal eſtate among his children, who would not be bound thereby, as he was a freeman; he then adds the expreſs clauſe, which is the ſole ground of diſtinction between this and other caſes; and in the codicil takes notice of this very inſtrument as a will; which codicil is ſigned, and puts that difficulty, which might otherwiſe have ariſen from the imperfection of

the inſtrument, out of the caſe; but notwithſtanding this, it is a will only by force of the inſtrument to paſs perſonal eſtate; for neither the will or codicil is ſo executed as to paſs real. The plaintiff inſiſts, that defendant having a legacy by the will, which is undoubtedly good, ſhall have no benefit thereof, unleſs ſhe ſuffers the diſpoſition of the land to take effect. *Noys* v. *Mordaunt* (which was the firſt caſe) was, where the teſtator was diſpoſing of land. The ſubſequent caſes till *Streatfield* v. *Streatfield*, I believe, were all in caſe of a deviſe of real eſtate. Had the rule gone no further, but been confined to real eſtate, this objection had never ariſen; becauſe the inſtrument muſt be effectual as well to one real eſtate as another; ſo that this difficulty could never have ariſen to make the point come in queſtion. Lord *Talbot* went ſo far as, that where the will compriſed both real and perſonal, and the land, to which one child was intitled in tail, was thereby given to another, and a perſonal legacy to the tenant in tail; to conſider it as an implied intent, that whoever took by that will, ſhould comply with the whole; ſo that he put the party to an election; but neither in *Jenkins* v. *Jenkins*, nor in *Streatfield* v. *Streatfield* was there a queſtion of the defect of the inſtrument. Then came *Herle* v. *Greenbank*; which I believe was the firſt caſe, in which the difficulty aroſe. There Mrs. *Winſmore* was a feme covert and an infant, and had by her father's will a power to diſpoſe of real and perſonal eſtate; and being above 17, diſpoſed of the perſonal eſtate of her father for her daughter, and her real eſtate to two collateral relations; and died under age. I was of opinion, that as to the perſonal it was a good will, becauſe of her power, which took off the diſability from being married, leaving her in the ſame condition as a feme ſole; in which caſe, being above 17, ſhe might make a will of perſonal; but that as to the real, her will was void becauſe of her infancy, as it would if ſhe had been a feme ſole: which gave riſe to the other queſtion now mentioned, whether on the authority of the aforeſaid caſes, ſtill her daughter ſhould not be put to make her election, whether ſhe would abide by the whole will, or wave the whole will? My opinion was grounded upon there being no inſtrument executed ſufficient to paſs land; and there were none of the caſes, in which it was determined, there ſhould be ſuch election, but where there was a will concerning the land; but that there was no ground for the court to imply a condition to abide by a will of land, when there was none; and that it would be dangerous to break in on the ſtatute of frauds to make an eſtate paſs by an inſtrument not ſufficient to paſs real eſtate, not by the words of the teſtator, but by a condition implied by conſtruction of the court; therefore it could not be, nor was it warranted by any precedent; for it was only gueſſing at the intent of the teſtator who might leave it for that very view. But the queſtion is, whether this caſe does not differ from that from the expreſs clauſe in the will. It is very candidly admitted, that if

Where heir not put to election.

there is no deviſe of a real eſtate, but a perſonal legacy is given on expreſs condition, that the legatee ſhould not enjoy it, unleſs within a certain time he conveys a real eſtate, whether coming from the teſtator or not, he ſhall not enjoy it but on thoſe terms; the lands not paſſing by force of the bill, but from the operation of the clauſe. The legatee has it in his power, whether he will part with the land or not; if not he forfeits the condition; for any lawful condition may be annexed. The caſe may be put a little farther (though it is almoſt the ſame with the preſent:) as ſuppoſe in the ſame inſtrument there is a deviſe both of real and perſonal; the will executed only ſufficient to paſs the perſonal, not the real; but a condition annexed, that the perſonal legatee ſhould permit the ſame perſons, to whom the land is given, to hold to them and their heirs: the condition annexed would take place, though the deviſe was void as to the lands according to the ſtatute of frauds; for the legatee cannot take it in contradiction to the teſtator's words; and the deviſe in this will amounts to the ſame, as if teſtator had annexed a condition to permit *Stephen* to enjoy the land. The clauſe is imperfect as well as the whole will; and the court muſt put a reaſonable conſtruction; which is, that none of the deviſees ſhould receive any benefit by this will, unleſs they ſuffered the whole inſtrument to take effect; not having regard to the validity or force of it according to the ſtatute of frauds, but to the clauſes and expreſſions uſed. The conſtruction put on the words *my will*, (*viz.* ſo far as valid and executed properly) is much too narrow; and this makes a material diſtinction between this caſe and *Herle* v. *Greenbank*, where there was no condition in the will, it reſting ſingly on the conſtruction the court was to make, that it was an implied condition in the will, that thoſe claiming benefit by it ſhould ſuffer the whole to take effect; and then it muſt neceſſarily refer to the validity of the will: for it is rightly argued, this will cannot be read ſo as to ſupport a will of real eſtate, not being an inſtrument for that. In that caſe, when the court was to make ſuch a conſtruction by implication from the force of the inſtrument itſelf, the court muſt ſee the will, and could not know or take notice, that that was a will of real eſtate; but here, if there is ſuch a condition annexed to a perſonal legacy, the court muſt conſider every part of that, whether it is a matter relating to real eſtate or not. You muſt read the whole will relating to the perſonal legacy, let it relate to what it will, which is a ſubſtantial difference, and will prevent going too far to break in on the ſtatute of frauds, and at the ſame time will attain natural juſtice; which requires, as far as may be, ſuch a conſtruction to be made; otherwiſe the intent of the teſtator may be overturned. And here is a circumſtance bringing it more within the reaſoning of Lord *Cowper* in *Noys* v. *Mordaunt*, than there was in *Herle* v. *Greenbank*; that it is a diſpoſition among his children, and it is deſirable it ſhould take effect, if it can;

whereas

whereas in that caſe the further diſpoſition was among collateral relations; which therefore did not come within the reaſoning of Lord *Cowper*, though I allow, that was but auxiliary reaſoning. This differs, being an expreſs condition annexed to a perſonal legacy; and therefore the defendant cannot take both real and perſonal.

But there may be a difficulty how to carry it into execution; for, being an infant of tender years, ſhe cannot judge for herſelf; nor can the Maſter judge for her; it being on ſeveral contingencies; ſo that until ſhe comes of age, no election can be made; till when, the plaintiff muſt receive the rents and profits of the eſtate ſubject to further order of the court; but muſt be reſtrained from committing waſte. If the infant ſhall elect to have the land, then, whatever the plaintiff ſhall be intitled to as his orphanage part of teſtator's perſonal eſtate, will be liable to make ſatisfaction for what he ſhall have received out of the rents and profits of the real, as the court ſhall direct.

Coſts out of the perſonal eſtate.

Note: In *Brudenell* v. *Bowton* (as cited) the teſtator by will executed according to the ſtatute, gave 800*l.* to be laid out in land for one for life, and then for her children; and gave his eſtate by way of reſidue, ſo as to be a charge for debts and legacies on the real eſtate in default of the perſonal; he made a codicil, not executed according to the ſtatute of frauds, revoking all former wills, and revoking the 800*l.* legacy, and giving 400*l.* where his Lordſhip held, that could not revoke the diſpoſition made for payment of debts and legacies; therefore the real eſtate was ſtill chargeable therewith. But the queſtion was, whether that 400*l.* by the codicil could be charged on the real eſtate; becauſe the codicil giving it does not charge the real? His Lordſhip held, it was a revocation of the 800*l.* as originally charged; and was of opinion, that the 400*l.* was charged by the former charge on the real eſtate by virtue only of the original will.

Caſe 3.

Ward *verſus* Shallet, July 26, 1750.

Settlement by huſband on wife and children, on her agreeing with her friends privity, to part with her contingent intereſt; good againſt his creditors.

A Wife having a contingent intereſt under a bond given by huſband on the marriage, but no judgment entered up, nor any truſtees added for her, had alſo a leaſe of the cornmeter's office left her by the will of her father, whoſe executor would not aſſent to the huſband's ſale thereof, unleſs he made a further proviſion for her. But on a meeting with her friends, ſhe agrees, that upon ſettling part of the money ariſing from the ſale for her ſeparate uſe during her

huſband's life, and afterward for the children of the marriage, ſhe will part with her intereſt under the bond; the other part of the money to go to the huſband; who becomes bankrupt.

The bill was brought by the aſſignees under the commiſſion to ſubject her ſeparate property; that the tranſaction was not to ſecure the bond, but to protect the huſband's eſtate againſt creditors. No conſideration from the wife's joining; for the office veſting in the huſband, he might have diſpoſed of it without her, which would have bound her. In the caſe of *Richardſon*, *Auguſt* 1749, Deputy Marſhal for life becoming bankrupt, as he might by his acts anticipate the profits, though not diſpoſe of the office directly, his Lordſhip, though he did not take away the office (becauſe that was in the power of the city) yet appropriated the profits for the aſſignees. So of the profits of *Blackerby*'s office of taking care of the houſe of Lords, held aſſets for his creditors. In almoſt every caſe of this kind there is ſomething hard, where the wife is in danger of loſing all her proviſion, as his Lordſhip thought in *Fitſer* v. *Fitſer*, *February* 22, 1742, yet could not help it. There a wife had an annuity of 50*l.* for life charged on land: her huſband on agreement to live ſeparate, aſſigned this annuity during their joint lives, in truſt to pay her part for her ſeparate maintenance, and part for her infant child; and agreed, that if he was ſued for her ſeparate debts, the truſt for her ſhould be void; he became inſolvent, and aſſigned over all his eſtate for his creditors: on a bill by the wife, the queſtion was, whether this aſſignment was voluntary and fraudulent as to creditors; and ſo held, and that this maintenance for his wife was not ſuch a valuable conſideration, as ſhould defeat the creditors; and this though not under the acts of bankruptcy, which is ſtronger. Otherwiſe any thing of the wife's might be ſo appropriated for a trifling conſideration, wherever ſhe has a fortune, which is in the huſband during their joint lives. A court of equity, where a huſband cannot come at a truſt eſtate of his wife, and has not before made a ſufficient proviſion for her, will ſay, he ſhall do ſo; but not where he wants not aſſiſtance of equity.

LORD CHANCELLOR.

It is improper to give relief in equity in this caſe. To be ſure it is the duty of aſſignees under the commiſſion to endeavour to encreaſe the eſtate for benefit of creditors, and to enquire into any family tranſaction, eſpecially between huſband and wife, which is liable to moſt ſuſpicion. But the court muſt not carry it ſo far as to ſet aſide an act for valuable conſideration; and if this was to prevail, it is one of the hardeſt demands I ever ſaw. Firſt as to the conſiderations; the wife's joining in the ſale is rather the weaker part; perhaps the huſband might have diſpoſed of it without her, and bound her thereby; but if her father had acted more cautiouſly, and added

Huſband obliged to make further proviſion upon getting wife's truſt eſtate.

added truſtees for his daughter on her marriage, the court would not have let the huſband take it from her without making ſome further proviſion, if ſhe inſiſted on it. The father did not do ſo; but his executor held his hand, and therein did reaſonably. It is true, he might have been compelled to aſſent to the legacy; and in that caſe of a bare aſſent to a legacy by an executor, I do not know that the court would put terms on the huſband. But on the ſecond part here is a clear conſideration ariſing from the wife and her friends; the parting with her contingent intereſt under the bond; which may be a conſideration as well as a certain intereſt; and the wife inſiſting on the benefit of it, I think, is barred from any claim under the bond; for it is a tranſaction between huſband and wife with privity and conſent of her friends. To ſhew that by ſuch an agreement, and claiming the benefit of it for her ſeparate uſe, ſhe is barred; *Theobald* v. *Defoy* is a very ſtrong authority, where the wife was barred of a poſſibility by ſuch an act. Then, if this is a conſideration, it takes it out of all the ſtatutes; out of the ſtatute of *Eliz.* in reſpect of creditors; to bring it within which it muſt be proved, he was indebted at the time of the act; as it was in Miſs *Windham*'s caſe* the other day, where I put them to the proof of that; but the contrary rather appears here. Then how does it ſtand as to the ſtatutes of bankruptcy? They do not extend to caſes, where there is a conſideration; therefore if the father, or a collateral relation, advanced a ſum of money by way of new portion, in conſideration of which the huſband made a new ſettlement, it would be good againſt the creditors under the commiſſion; unleſs proved that the ſettlement vaſtly exceeded the conſideration; ſo that from the inadequateneſs a colluſion or fraud was intended on the creditors; in which caſe, I believe, the court has ſometimes ſo conſidered it: but nothing of that appears in this caſe, which brings it to the reaſonableneſs of it. And having married this woman ſo incautiouſly, taking no judgment on the bond, nor any preſent ſecurity, (ſo that if the huſband became a bankrupt, there was no poſſibility of her coming in as a creditor, nor could ſhe have any ſatisfaction for this, unleſs the huſband gained a new eſtate) the ſettling part for the wife and children has nothing exorbitant or unreaſonable in it: and there being a conſideration for it, which takes it out of the ſtatutes, it is improper for the court to interpoſe and ſet it aſide. This was a reaſonable act for her and her friends to do; it not appearing to be done with a view to the bankruptcy, nor that he was in debt at the time.

* Caſe 1.

New ſettlement by huſband in conſideration of a new portion, if no fraud, nor inadequate, is good againſt his creditors.

Therefore the bill muſt be diſmiſſed, ſo far as it ſeeks to impeach and ſet aſide this deed; but with liberty for the aſſignees to apply in caſe that contingency happens, on which the huſband would be intitled to it.

Without coſts on either ſide.

Cox

Cox *verſus* Bateman. *Auguſt* 1, 1750. Caſe 4.

JOHN LONG BATEMAN having purchaſed a real eſtate in *Ireland*, with 1500*l.* truſt-money; *Lord Chancellor* ſaid, He could not follow the money and charge his real eſtate therewith; there being no act of parliament in *Ireland* for that purpoſe, although there was to charge the real eſtate of bankers with their notes, *viz.* 8 *G.* 1. which was the foundation of the appeal to the Lords in the caſe of *Burton* the banker; but that act extended only to bankers. It was an unfortunate caſe; but he could not help it; nor could he vary the rule, and make a law to ſubject the real eſtate. It was a breach of truſt, and muſt be a charge on his perſonal eſtate: but he would help it as far as he could; and therefore if any ſpecialty-creditors exhauſt the perſonal, let the ſimple contract creditors ſtand in their place, to have ſatisfaction out of the real eſtate.

Land in Ireland purchaſed with truſt money, the perſonal eſtate only charged.

Clavey *verſus* How. *Auguſt* 1, 1750. Caſe 5.

LORD CHANCELLOR.

A Deed, though in favour of creditors, may be evidence of an act of bankruptcy; as it may be fraudulent, though for creditors, if the poſſeſſion was left with the bankrupt; according to *Twine*'s caſe, which was a deed in favour of a creditor. And that was the caſe in *Jacob* v. *Sheppard*; where, on appeal, Lord *King* directed it to be tried, whether a deed in favour of a creditor was not an act of bankruptcy, although on the circumſtances it was found not to be ſo. I cannot make an equitable bankruptcy; but a trial muſt be directed.

Deed, though for creditors, may be evidence of act of bankruptcy.

Travers and Others, Executors of Lord Powis, *verſus* Lord Stafford and Mr. Furneſs, *Oct.* 15, 1750. Caſe 6.

A Bill had been brought by Lord *Powis*, to ſtay proceedings at law by the repreſentatives of Mr. *Cantillon* againſt him, as being ſurety for Mr. *Gage*, who was indebted to the eſtate of *Cantillon* and *Hughes*, bankers at *Paris*; on which bill Lord *Powis* had an injunction: and after an anſwer an order was made in 1731. continuing the injunction upon certain and ſpecial terms. It was afterward, by conſent of all parties, referred to Mr. *Fazakerly*, who awarded 15470*l.* due to the eſtate of *Cantillon*. A motion was afterward made by the defendant to diſſolve the injunction; upon which ſpecial liberty was given to take out execution for the ſum awarded due.

Injunction on praying time to anſwer, if diſſolved on the merits, a new one cannot be applied for of courſe on an amended or ſupplemental bill.

After

Irregularity in obtaining injunction not waved by applying for time to anſwer.

After this a new bill was brought in 1743. to ſtay the proceedings on ſuggeſting ſeveral equitable circumſtances at large, relative to the account, and praying an injunction: a plea was put in by the repreſentatives of Mr. *Cantillon*, of this order and award; which plea was allowed in *March* 1745. In 1749. a bill was brought to ſtay the proceedings at law on this 1547*l.* and for an allowance and ſet off for what was due from the eſtate of *Cantillon* to *Gage* the principal; on which bill an injunction was obtained, on motion to ſtay proceedings at law until anſwer and further order.

To diſcharge this injunction a motion was now made by the defendants; for that upon no amended or ſupplemental, much leſs on a new original bill, between the ſame parties, can an injunction, once diſſolved on the merits on a bill to ſtay proceedings at law, be revived for want of an anſwer as of courſe.

For plaintiffs: Perhaps this might be the rule; but it is not applicable: for the demand in the laſt bill by the repreſentatives of Lord *Powis* is for a different equity, from what it was before, and a new right. But if any irregularity, the defendants by ſuffering ſuch a length of time, and by repeated applications for further time to anſwer, have ſubmitted to and waved it.

LORD CHANCELLOR.

The fundamental queſtion is, of the regularity or irregularity; but attended with ſo many particular circumſtances, as perhaps it is not to be governed by the general courſe of the court as to ſuch injunctions, but by the diſcretion of the court. The juriſdiction of the court, as to injunctions, is a moſt uſeful one; without which the benefit of any equity againſt proceedings at law cannot be had; yet may they be made uſe of as handles to delay the obtaining juſtice at law; and therefore it is the duty of this court to prevent the abuſe of that juriſdiction as much as poſſible.

There are three points in the conſidering this cauſe: 1*ſt*, upon the nature of theſe proceedings, as it ſtands on the former, abſtracted from the particularity of the order in 1743. by which a ſpecial liberty was given to take out execution. Next as it ſtands ſtrictly on the foot of that order. Next as to the length of time and acquieſcence of the defendants, (plaintiffs at law) and what is ſuggeſted to be a waving of the irregularity.

As to the firſt; abſtracted from that order, and ſuppoſing it had been only a general order, diſſolving the former injunction; ſeveral things on that head are plain. That a bill may be in this court originally on equitable circumſtances for an injunction; and on filing it,

if anſwer, plea, or demurrer, comes not in within a time limited by the courſe of the court, which is very ſhort, (and hardly a cauſe in which it is not neceſſary to pray further time) if the defendant ſtands in contempt, or prays time beyond the ordinary time, an injunction may be until anſwer. But though there is liberty to do this, and that often tends to great delay (which cannot be avoided) yet if once an injunction is diſſolved on the merits upon the anſwer put in, whether by decree of the court on diſmiſſing the bill, or on motion upon coming in of the anſwer on arguing of the merits as they appear on the oath only of the defendant; if the plaintiff amends that bill, or files a ſupplemental bill with new matter, which is part of the old cauſe, he cannot apply as of courſe for a new injunction to ſtay proceedings until anſwer or further order, (though perhaps it may be done on ſpecial motion); and orders ſo obtained have been always diſcharged, when applied for, as irregular and as obtained by ſurprize. The ground of that courſe of the court is, that the plaintiff ought to ſtate his caſe on filing the original bill as to the merits of his equity; the court not giving him liberty to ſplit and retail out his equity to apply upon another head for another injunction after his former is diſſolved. To apply this to the firſt point. The motion to diſſolve the injunction was ſolemnly argued; and the court held the order of reference by conſent an order of the court; therefore the determination of the arbitrator, when made an order of the court, was within the terms of the order for continuing the injunction; and therefore they ſhould have the benefit of it, as if it had been decreed. It was rather ſtronger; becauſe where there is a reference to a judge of the parties own chuſing, it ſuperſedes all errors, except corruption or partiality, which are not pretended in this caſe; and it is fit it ſhould be ſo, otherwiſe there never would be an end of things. The injunction was not indeed diſſolved on that motion; becauſe then execution might be taken for the whole penalty; and then the plaintiffs might be put to bring a new bill; and therefore ſpecial liberty was given to take out execution for the ſum awarded. The plea put into the bill, which was to open the award, was alſo very ſolemnly argued. I allowed the plea of the award; in conſequence of which, the injunction, if there was one, was diſſolved of courſe. One would have thought, there would then have been an end of it; but a new bill was brought, and a motion for injunction thereon. I am of opinion, that within the reaſon of the caſes above-mentioned, and the courſe of the court, it was not regular, and that ſuch motion ought not to have been made; at leaſt it ſhould have been a motion bringing the whole circumſtances before the court. Suppoſe, the former injunction had been diſſolved by a decree, at the ſame time diſmiſſing the bill; there could not be a new bill and injunction without a ſpecial motion laying the whole circumſtances before the court; for then it would be in the power of any one to obtain an injunction. If the anſwer is not ſuf-

ficient, exceptions are ſhewn for cauſe; and if any one is allowed, it would keep up the injunction. It is ſaid to be a new equity veſted in the repreſentatives of Lord *Powis* ſubſequent to the time of the former bill, and therefore they ſhould have the benefit of it in this ordinary ſhape; if ſo, upon arguing the plea the bill ought to have been amended; or rather (as it was ſubſequent matter) a ſupplemental bill charging it; which would have put the plea out of the caſe, ſo that a new plea ſhould have been put in: but I deny the principle, that this is a new right. The plaintiffs had exactly the ſame right, when the bill was filed in 1743. for if Lord *Powis* was only a ſecurity for *Gage*, the ſurety is certainly intitled to the whole equity his principal had; and therefore, if they had an aſſignment from *Gage*, they might have made uſe of the debt or demand due from the eſtate of *Cantillon* to *Gage*, to defend themſelves againſt this demand by the repreſentatives of *Cantillon* on them as ſureties for *Gage* by having an account taken, and that ſet off. I cannot believe they did not know they had that demand; becauſe it is now admitted, that a bill had been brought by *Gage* in 1740. founded on that; ſo that there was a *Lis pendens* concerning theſe demands at the time of their bill in 1743. then why were not theſe demands ſtated in that bill? If they did not know it, it would rather be a foundation for a bill of review, as not known to Lord *Powis* or his repreſentatives. If therefore the courſe of the court had been, that on exception for cauſe to maintain the injunction, a material exception ſhould be opened (as was the courſe formerly) I ſhould not have thought this an exception to maintain that injunction.

But I ſhall ground my opinion particularly on the 2*d* point, the circumſtances of that order in 1743. It would be dangerous, that, after what has been done, the parties might file a new bill, and move for an injunction until anſwer, without taking notice of that order. If ſo, it would be granting an injunction by the court not only againſt proceedings at law, but their own proceedings; for this is an order made in direct contradiction to the order in 1743. without diſcharging it; which is irregular: ſo that it depends not in all the parts of it upon the ſtrict courſe of the court as to injunctions, but in the court's diſcretion. The whole ſhould have been brought before the court, and then it would have appeared, this new bill was founded on an equity exiſting materially at the time of the former order; the ſurety being intitled to any equity the principal had. This order is therefore irregular.

As to the laſt queſtion, I agree with the plaintiffs that the irregularity may be ſubmitted to and waved by the parties affirming it by his own act, though at firſt irregular: but nothing of that was done by the defendants; any act founded on the injunction would certainly be a waver of that irregularity, affirming that a regular injunction ſubſiſted.

The defendant has applied for time to anſwer, but that may be applied for, whether there is an injunction or not, to avoid proceſs of contempt. This order then in 1749, ought to be diſcharged; and it would be an imputation upon the proceedings of this court, if it ſhould hold ſo ſtrict a hand as to ſay, theſe forms of the court as to injunctions, which are neceſſary in general, ſhould go to that extent as to be allowed without the merits entered into, after examined by an arbitrator which on a plea of the award was allowed; eſpecially when grounded on an equity, which if not connected with the original proceedings would be no equity at all: and, when tacked to the other proceedings, an anſwer ariſes thereto, that, if ſo, it was an equity ſubſiſting at the time of their bringing the former bill in 1743.

——— *October* 15, 1750. Caſe 7.

Orders for ſervice diſcretionary.

MOTION that ſervice of *ſubpæna* to hear judgment on a perſon who acted as ſolicitor for one of the defendants, Mrs. *Pamfillon*, might be deemed good ſervice; her clerk in court not being to be found, nor any one attending at his office, nor the defendant, but they had found the laſt place of her abode.

LORD CHANCELLOR.

I never knew it done, eſpecially upon a ſolicitor, who ſays he knows not where his client lives. But as theſe orders for ſervice are pretty much diſcretionary, it will be no great harm, to allow it together with leaving a copy of the preſent order with ſome perſon in the houſe, which was the defendant's laſt place of abode.

Taylor *verſus* Philips. *Oct.* 17, 1750. Caſe 8.

LORD CHANCELLOR.

Infant's inheritance not bound by act of the court.

THERE is no inſtance of this court's binding the inheritance of an infant by any diſcretionary act of the court. As to perſonal things, as in the compoſition of debts, it has been done; but never as to the inheritance; for that would be taking on the court a legiſlative authority, doing that which is properly the ſubject of a private bill.

It was urged, that the court had gone a good way, and Mr. *Chetwynd*'s caſe by Lord *Talbot* mentioned.

LORD

LORD CHANCELLOR.

There was an election to be made; ſomething was neceſſary to be done. I remember I was of opinion with the decree, when it came afterward in the Houſe of Lords.

Caſe 9. Fenhoulet *verſus* Paſſavant, *Oct.* 17, 1750.

Scandal includes impertinence; not e con'.

EXCEPTION to the maſter's report that the bill was impertinent only; the reference being whether ſcandalous and impertinent.

LORD CHANCELLOR.

Nothing relevant, ſcandalous.

Scandal may be taken advantage of at any time, impertinence not; if reported ſcandalous, it muſt be impertinent of courſe; but it may be impertinent without being ſcandalous. The ſingle queſtion is, whether theſe charges, referred for ſcandal and impertinence, may be relevant to the merits: and the *majus* or *minus* of the relevancy is not material; which turns on this, whether plaintiff has any ground for this ſuit or not; for if relevant, it cannot be ſaid they are ſcandalous or impertinent. Otherwiſe it would be laying down a rule, that all charges of fraud are ſcandalous; which would be dangerous, and cannot be the rule; for nothing pertinent to the cauſe can be ſaid to be ſcandalous. So in a bill to ſet aſide deeds for fraud, there are often groſs charges, which may be as well ſaid to be ſcandalous as this.

Caſe 10. Meliorucchy *verſus* Meliorucchy. *Oct.* 19, 1750.

Security for coſts by plaintiff beyond ſea ſhould be applied for before praying time to anſwer, if it appears on face of bill, or is in defendant's knowledge.

MOTION on part of defendant, after applying for time to anſwer, that the plaintiff, who in his bill charged himſelf to be reſident at *Florence*, ſhould give ſecurity to anſwer coſts: and the caſe of *Glamorgan* v. *Rugby* was cited, where his Lordſhip held it pretty much in diſcretion of the court, and might be taken advantage of at any time on the circumſtances.

LORD CHANCELLOR.

This has come once or twice before me. If on the face of the bill the plaintiff appears to be beyond ſea, as it does here, or if at the time of filing the bill it appears you knew it, you may apply for ſecurity to anſwer coſts; but advantage ſhould be taken of it in the firſt inſtance before anſwer, or time prayed to anſwer; otherwiſe it is waved. If indeed you are ſtrangers to it, and it comes to your knowledge at any time in the courſe of the cauſe, it may be prayed; but here it is waved, it appearing on the face of the bill.

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Ex parte Wright, *Oct.* 20, 1750. Caſe 11.

LORD CHANCELLOR.

IN paſſing the accounts from time to time of a lunatick's eſtate, notice ſhould be always given to ſuch of the lunatick's relations to attend before the Maſter to check the account, as would be intitled to a ſhare of his eſtate, if he had been dead inteſtate: but they are not to be allowed the coſts thereof, unleſs ſome ſpecial caſe laid before the court; as that they were at expence on ſome extraordinary litigation as to the account. Otherwiſe if every ſuch relation, who thought he had an intereſt to attend, ſhould have the coſts, it would bring a great burthen on the lunatick's eſtate.

No coſts of attending on lunatick's eſtate.

Ex parte Stanley, *Oct.* 20, 1750. Caſe 12.

PETITION to ſuperſede a commiſſion of lunacy preferred by the neareſt relations of the party.

LORD CHANCELLOR.

It ſhould always be in the name of the perſon, who has recovered a ſound mind.

———————. *Oct.* 22, 1750. Caſe 13.

PETITION by *Owen* to be diſcharged from a contempt and cuſtody for non-payment of coſts taxed for ſcandal and impertinence againſt *F. Liſter*, who had executed a releaſe to *Owen*; which releaſe, it was inſiſted, ſhould bind *Broom* the clerk in court, who carried on the proſecution againſt the petitioner.

Voluntary releaſe by client not to defeat the clerk of his lien for coſts.

LORD CHANCELLOR.

The clerk in court has a general lien on the duty recovered by his diligence and expence; which extends as well to collateral proceedings as to a decree. But it is objected, that the client has releaſed it to his adverſary, and that that binds his ſolicitor or clerk in court; who, though they have originally a lien, on what has been recovered by their expence, diligence, and coſts, yet that is not to extend to that degree as to prevent the client fairly and honeſtly from making an end with his adverſary. I am of that opinion, provided any thing appeared to be paid. If the client had by compoſition, or any

reaſonable conſideration for the coſts, made an end with his adverſary, I would not ſuffer this equity to be ſet up: but if a clerk in court, having this equity, ſhall be diſcharged by a mere voluntary releaſe executed by his client and his adverſary, he might be defeated by a colluſion; like the caſe ariſing out of *Hertfordſhire* about a year ago on motion. This is the diſtinction; the coſts are not paid; no compoſition or conſideration; but a mere voluntary releaſe ſet up to defeat the clerk in court; which might be done in any caſe, if the court ſhould ſuffer this. Had there been any conſideration, I ſhould have laid weight thereon; but no ſuch appears on evidence.

As to this contempt therefore, and the attachment thereon, let the petitioner be diſcharged on payment to *Broom*; it appearing that *F. Liſter* has executed a releaſe.

Caſe 14. Ex parte Lord, *Oct.* 22, 1750.

PETITION to ſet aſide a commiſſion of bankruptcy as fraudulently obtained.

Fraudulent bankruptcy.

Againſt which it was urged, that this petition was founded on the affidavit of three perſons, who by their voluntary affidavit came now into a court of juſtice, and ſaid, they were perjured; having ſworn themſelves creditors, when they were none. Then the rule of the civil law held, *ſemel malus ſemper præſumitur eſſe malus in eodem genere*; and it appearing to the court, they ought to be proſecuted for perjury on the late act of parliament.

LORD CHANCELLOR.

On contradictory affidavits of ſame perſon, perſonal examination required.

The general rule is, that whoever produces the affidavit of a perſon to contradict a former made by that perſon, ſhould produce him in court; a perſonal examination being required: of which there was the ſtrongeſt inſtance in Lord *King*'s time, when I was Attorney General. There were ſeveral perſons, who had been induced into this practice; and in conſideration of 2*s.* 6*d.* a-piece came and ſwore themſelves creditors under the commiſſion, and ſigned the certificate; which was obtained thereon. The matter was diſcovered, and they attended in court: Lord *King* recommended it to me to proſecute them for perjury; which I did. Here the perſons made the diſcovery; which was not in that caſe; and there is ſomething weaker here, for none of them ſwear to any reward.

Let the commiſſioners inquire, whether theſe three perſons were creditors of the bankrupt, and for what conſideration; and at what time the ſeveral notes, under which they have proved their debts

under

under the commiſſion, were given by the bankrupt; and whether any conſideration; and at whoſe inſtance or ſolicitation they were given; and inquire into the reality of any other debt, as they ſhall ſee cauſe.

This is a proceeding, which if allowed, it would be better, the ſtatutes of bankruptcy did not ſtand as a law: the court ſhould not in the leaſt give way to it.

Blinkhorn *verſus* Feaſt, *October* 24, 1750. Caſe 15.

A Man by his will gave to two perſons particular ſpecifick legacies, ſeverally to each by name, and in the laſt clauſe made them joint and ſole executors, ſaying nothing of the reſidue. The executors were infants.

The next of kin brought this bill, claiming the ſurplus as a reſulting truſt within the rule, where executors have ſomething given: and that the next of kin will be aſſiſted here as well as an heir at law. The court in theſe caſes has gone upon general rules; not diſtinguiſhing between one joint legacy to the executors, or giving different legacies: but from giving theſe diſtinct and ſeverally, teſtator could not intend they ſhould take the reſidue jointly; and though theſe are ſpecifick legacies, it is ſettled, that, if given abſolutely, it is the ſame as if pecuniary.

For defendants: The executors have a legal right. By the rule of law the making an executor is putting him in teſtator's place; ſo that he cannot be witneſs for the will, not even in a court of equity, becauſe he is intereſted. The ground, on which the court goes in the above rule, is, that teſtator intended him this and no more; and therefore the reſidue ſhould be looked on as undiſpoſed. *Foſter* v. *Munt*, 1 *Ver.* 473. 2 *Ver.* 648. was determined on very particular circumſtances, and a very ſtrong implication that the reſidue was not given; there being a legacy to executor for care and pains. From that caſe a general rule was ſet up in this court, and ſeveral years before it was brought back to common ſenſe and reaſon; for it was at firſt contended for, wherever a legacy was given, any how, and whatever other difficulties aroſe. At laſt the rule was eſtabliſhed, that whereever a particular legacy was given by expreſs words, ſo as to ſhew that particular gift was unneceſſary, if teſtator intended the legatee ſhould take the reſidue by making him executor, he ſhould conſequently be truſtee for next of kin: but that equity may be rebutted by parol evidence, that teſtator meant it. It is now ſettled, that the barely being a wife executrix takes away the preſumption, ſo that ſhe is not excluded. So where the particular legacy to the executor is ſubject to a contingency or limitation over, that does not exclude from

from the reſidue; becauſe it was neceſſary to give him the particular legacy expreſſly, in order to ingraft thereon. So where the legacy is with an exception, that will not afford a preſumption: alſo where one executor has a legacy, the other none. Where there is any thing ſhewing, that it was proper for teſtator to do this, and yet to intend them the reſidue, the implication fails, and there is a ſtrong reaſon here, *viz.* teſtator's intending to prefer one executor to the other, and to make a difference between them: but no preſumption ariſes thence, that he intended them nothing elſe. In *Buffart* v. *Bradford, Nov.* 27, 1741. teſtator gave one executor a conſiderable legacy, and to the other, his wife and children, a legacy for mourning: your Lordſhip held it clear, that a legacy to one of two executors excludes neither from the reſidue; and that you ſhould think it hard to exclude an executor by a legacy for mourning. It is the act of parliament, which gives this to the next of kin; not that they are favoured in this court; and the above rule has gone far enough already. Beſide, theſe executors are infants, and muſt be intended to be made executors for their own benefit; and teſtator has given his whole eſtate between both of them, but the reſidue is not particularly given. But, if it was neceſſary, there is parol evidence ſufficient, that teſtator intended to leave the whole to them; and that is admitted in caſe of fraud, to aſcertain identity, and rebut an equity.

LORD CHANCELLOR.

There is but one queſtion: whether on the conſtruction of the will here is a reſulting truſt of the reſidue of the perſonal eſtate, over and above debts and legacies, for the next of kin?

There might have been another incidental queſtion upon the reading the parol evidence: and it is certain, that it has been read to rebut an equity ariſing from a reſulting truſt; as in *Littlebury* v. *Buckly*.* But ſince *Brown* v. *Selwyn* ‖ I have been extremely tender of admitting it in queſtions of this kind; though I never doubted it, where it was to aſcertain identity; or, in caſe of collateral ſatisfaction, where there was a legacy by a father, and afterward a portion given. Not that what was done there was final; for Lord *Talbot* changed his opinion in the courſe of the cauſe. At firſt he read the evidence; and took time to conſider of the point on the will; and next morning declared, he had changed his opinion as to the admiſſion of the parol evidence, and had it ſtruck out of the minutes; which might poſſibly be from his going on the words in the will, as has been ſaid. This is only to explain and introduce this declaration, that I do not give an opinion to reject this evidence in all events, but to lay it out of the caſe, as there is no neceſſity to enter into it at preſent.

* 2 Ver. 667. Eq Ab. 245.
‖ Talb. 240.

This brings it to the queſtion of reſulting truſt; for there is no pretence of an inteſtacy; for he has died teſtate as to his whole

eſtate, from his having made executors; as to which I remember a motion in *B. R.* (when I was a ſtudent) for a prohibition to a ſuit in the eccleſiaſtical court to compel a diſtribution of ſuch a ſurplus; which was granted; for certainly he was dead teſtate, by making a will and executors, as to his whole eſtate, and could not be dead inteſtate at the ſame time. I have not a good while had a caſe before me on the head of reſulting truſt; and was glad of it, in hopes that people were grown ſo wiſe as to diſpoſe of their whole reſidue in favour of their executors. The queſtion is, whether each of theſe executors having diſtinct particular legacies, not to both jointly, excludes them from the ſurplus of the perſonal eſtate? I am of opinion, it does not create a reſulting truſt for the next of kin. The caſes on this head have been various. Lord *Harcourt* in general leaned in opinion to the executors; but theſe caſes have gone by ſteps. The firſt was *Foſter* v. *Mount*; and it was a good while before the grounds thereof were ſettled; for the vehemence with which Lord *Jefferies* unfortunately uſed to deliver himſelf, made it thought a caſe of fraud; but being afterward inquired into in another caſe, it appeared there was no colour of fraud. From that time it was taken, that where a legacy was given to an executor for his care and trouble, and no reſiduary bequeſt, there was a reſulting truſt for the next of kin; and a plain reaſon for it; for there was ſomething more than the implication ariſing from giving him the legacy only. Afterward it came to be a maxim, that it was abſurd to give all and ſome; and thence an implication, that by giving part expreſly, he did not mean to give the whole impliedly; and therefore it has been determined, that any legacy generally to the executor excludes him from the benefit of the ſurplus, and makes him truſtee for the next of kin. But all theſe caſes have been to prevent the teſtator's being ſurprized into giving away a great ſurplus of the perſonal eſtate unadviſedly, merely by naming an executor. But ſeveral limitations have been introduced on this rule; as where the legacy, whether ſpecifick or pecuniary, is given to the executor for life, that does not exclude him from the reſidue; becauſe he meant to take that particular legacy out of the reſidue for the ſake of giving him a limited intereſt. Further, if teſtator has given a legacy for life or years, and the reſiduary intereſt over to another, (which was the Ducheſs of *Beaufort*'s caſe) the court has ſaid, that is not ſufficient to exclude executor from the ſurplus; becauſe that might be for the ſake of taking out the intereſt given over. So where a legacy, with an exception out of it, as in a gift of a perſonal thing, with ſome exception, of which there was a caſe before me and Lord *Talbot*, and we both held, that would not exclude the executor; as that legacy was inſerted, not for the ſake of the executor, but to introduce the exception. Afterward came *Buffart* v. *Bradford*, where I held, that it excluded neither; becauſe there was a plain reaſon, for which the teſtator might give that legacy to one excutor, for the ſake of giving him a preference

in value to the other; as from the implication of law, in making them executors, they muſt take jointly and equally; which is within the ground of the other caſes. So far has been ſettled in this court: now comes a caſe, in which two infants are made executors; who, it is unlikely, ſhould be made executors for the ſake of adminiſtration of his eſtate only, (which is a circumſtance ſtrengthening it, though I do not rely on that,) and each has particular legacies out of his perſonal eſtate. I am of opinion, that will not exclude them from the benefit of the ſurplus for two reaſons. Firſt, he might give theſe legacies for the ſake of the inequality of diviſion of his perſonal eſtate among theſe executors; which is plain; for if it reſted on the force of making them executors, it would be equally divided among them; to prevent which he takes out ſo much by way of particular legacies, giving ſuch a mortgage to one, and ſuch a mortgage to the other, the value of which is unequal. But, ſecondly, another reaſon might be given, for the ſake of their having this by way of diſtinct intereſts to themſelves in ſeveralty, not liable to ſurvivorſhip by death of one. Conſequently no implication can ariſe from hence, that by giving theſe particular legacies he meant to make them truſtees: and this is ſtrengthened by both being infants, who cannot be intended to be executors in truſt for ſtrangers.

The bill therefore muſt be diſmiſſed, ſo far as it ſeeks relief concerning the teſtator's perſonal eſtate, without coſts.

Lord Chancellor afterward ſaid, he had looked into *Brown* v. *Selwyn*, and that there was no expreſs bequeſt there of the teſtator's debts, as was apprehended, but a general bequeſt of the reſt and reſidue, *&c.* which he mentioned, that the ſtate of that caſe might not be miſtaken.

Caſe 16. East *verſus* Cook, *October* 30, 1750.

JEREMIAH GOFF by his will gave 1000*l.* for the benefit of his daughter for life; and afterward to be divided among ſuch child or children as his daughter ſhould leave at the time of her deceaſe. That daughter had married *William Eaſt*; who by his will recited, That "*Goff* had agreed to give his daughter 1000*l.* in marriage, but did not, but by his will gave 1000*l.* to his daughter for life and afterwards to go among our children." Afterward he ſays, "*Goff* was a worthy and honourable gentleman; and, I believe, was perſuaded, his giving the 1000*l.* in that manner was performing the agreement; which 1000*l.* with other money I have laid out in bank ſtock: now, in honour of his memory, and to make good his intent and will, I give to my wife 1000*l.* and after her death equally to my two ſons *William* and *Gilbert*; my daughter

"Lady

" Lady *Parker Long* having, in her marriage ſettlement, releaſed " her right under the will of *Goff*, if ſhe had any."

Gilbert, as ſurviving his mother, brought this bill againſt the repreſentatives of his father to have a transfer of this 1000*l.* bank ſtock.

Defendants inſiſted, the plaintiff was intitled only to half; becauſe his father's will had made a variation from his grandfather's: and next, that this claim being in contradiction to his father's will, if he inſiſted on it, he muſt give up the beneficial legacies and portions therein, according to *Nays* v. *Mordaunt*, and *Billing* v. *Dacres*; by the late *Maſter of the Rolls* in 1743. where the uſe of jewels were deviſed to the wife during widowhood, and then over; alſo money-legacies, coach and horſes: ſhe marrying again, claimed the jewels under a ſettlement, whereby ſhe was intitled to them abſolutely. It was held, that if ſhe inſiſted on that claim, ſhe muſt relinquiſh her legacies under the will.

For plaintiff: *William Eaſt* intended the will of *Goff* ſhould be performed abſolutely, and that this 1000*l.* bank ſtock ſhould be conſidered as the 1000*l.* thereby given; and then that intent cannot be altered by the manner of directing it. In *Huggins* v. *Alexander*, 9 *Nov.* 1741. *John Alexander* deviſed to his wife all jewels, plate and furniture; then all his real and chattel eſtate, ſubject to two annuities due to his wife, in truſt to ſell and pay thereby all his debts; and all the reſidue of his eſtate to his children; and that it was his expreſs intent, that his perſonal eſtate, thus given to the children, ſhould be exempt from payment of debts. The real and chattel eſtate was not ſufficient to pay all the debts and thoſe two annuities. The wife inſiſted, that even the perſonal ſhould be liable to make up the annuities: the children, that then ſhe ſhould forfeit the other legacies. The court held, that though plainly intended, this perſonal eſtate ſhould be exempt, it was not ſuch a contradiction of the will as ſhould defeat her of her legacies: the intent was, ſhe ſhould have the annuities, as well as that the perſonal ſhould be exempt; and the law ſubjects the perſonal to debts, which ſhe might inſiſt on without ſuch a contradicting of the will. In another caſe, teſtator deviſed all his jewels to another, and legacies to his wife; and held, ſhe might claim her *paraphernalia*.

LORD CHANCELLOR.

This is a very particular caſe; for if taken on either will it is plain: the only difficulty is, from the neceſſity that both wills muſt be taken together. It is a caſe for making both wills conſiſtent, if the court can: however if there is any claſhing between one and the other,

juſtice requires the will of *Goff*, original owner of the money, to be principally conſidered; for though *Eaſt* has made a recital of a promiſe from *Goff*, yet it was not ſo as to be a binding obligatory contract; for no contract or agreement in writing appears; ſo that it was only an honorary obligation on *Goff*, and ſatisfied by him; as *Eaſt* has reaſonably taken it. Taking it on the will of *Goff*, it is plain he meant that no repreſentative of any children dying in life of the daughter, ſhould take any benefit of this ſum or the produce of it, but that it ſhould go as an increaſe of fortune to thoſe children in being at the time of her death; for he could not tell who would be the repreſentatives of thoſe who died in her life; and therefore could not mean them. But certainly this is not deciſive in the cauſe; for the will of *Eaſt* muſt be conſidered, and whether that has made an alteration. It ſeems to do ſo on the particular wording of it; but I am of opinion, it was not his intent to make an alteration: and, conſidering all the words of it, he has not, except as to Lady *Long* and his purchaſe from her: and I believe it was the introduction of that alteration has occaſioned ſome obſcurity in this will. He could not intend to recite *Goff*'s will falſely; but has recited it ſhort and defectively: nor could he mean to make an alteration in the ſubſequent deviſing part any more than in the recital. If it had ſtood on the deviſe to the two ſons, as an original bequeſt by way of limitation over to them after an uſufructuary intereſt for life to their mother, though both had died in her life, it would have gone equally to their repreſentatives, they being tenants in common; but all the words are to be taken together: for how does he make good *Goff*'s intent and will, unleſs he acts conformable thereto? In conſtruing wills it is not neceſſary to take all the words in the order they are. Suppoſe he had ſaid, in honour of *Goff*'s memory he gives it to his wife, and afterward to his two ſons, equally between them according to the will and intent of *Goff*, or to make it good (which is the ſame) it would have made it beyond all doubt by inſerting thoſe words ſubſequent to the bequeſt to the ſons; for then it would be only a bequeſt to them in the ſame manner as in the will of *Goff*; and it would be ſubject to juſt the ſame contingencies. This is the ordinary and common conſtruction in wills, not to conſider exactly the order of placing the words if it would better anſwer the apparent intent of the teſtator otherwiſe. It is plain this would be ſo; then the placing thoſe words in the beginning or end of the ſentence makes no difference. The following words ſhew he had no intent to alter *Goff*'s will in reſpect to all his children, but only his daughter; from whom he had purchaſed on her marriage any benefit ſhe might have under the will; and that this is the only reaſon of his naming the two ſons; otherwiſe he would have left the expreſſion generally among the children, as *Goff* had done; but he could not do that without letting her in again, with whom he had compounded; and this is the conſtruction anſwering juſtice, becauſe this was the property of *Goff*;

Order of words in wills not conſidered, if the intent better anſwered otherwiſe.

is

is warranted by the frame and texture of the will, and anſwers the intent of the parties.

But admitting, for argument's ſake only, there was a variation between the two wills; and that the latter, notwithſtanding the reference to the other, would bear the conſtruction put on it by the defendants, I am of opinion, the right to this ſum muſt have reſted on *Goff*'s will: and that introduces the queſtion, whether the plaintiff can break in on the conſtruction of his father's will, and at the ſame time claim the portion therein, according to the rule in *Noys* v. *Mordaunt* of not claiming by one part of a will in contradiction to another; which is a true rule, but has its exceptions? And it is far from being clear, that if the conſtruction of *Eaſt*'s will was, as contended for the defendant, that it would have that conſequence; for ſeveral caſes have been, and ſeveral more may be, in which a man by his will ſhall give a child, or other perſon, a legacy or portion in lieu and ſatisfaction of particular things expreſſed, which ſhall not exclude him from another benefit, though it may happen to be contrary to the will; for the court will not conſtrue it as meant in lieu of every thing elſe, when he has ſaid a particular thing; which *Eaſt* has done in his will; declaring what the proviſion for the plaintiff ſhould be in ſatisfaction of, not of this ſum of money.

Exceptions to the rule of not claiming by one part of a will and in contradiction to another.

Legacy in lieu of things expreſſed not to exclude from others.

Let the defendant therefore transfer it to plaintiff, without coſts on either ſide.

Pearce *verſus* Chamberlain, *October* 30, 1750. Caſe 17.

At the Rolls.

ARTICLES between *Robert Plummer* and *Daniel Pearce* recited, that *Plummer* had carried on the trade of a brewer at *Hoddeſdon*, and had employed *Pearce* as a ſervant and brewer; who having behaved himſelf faithfully, *&c.* and advancing a moiety of the value of the effects, he took him into partnerſhip for nine years, if *Pearce* ſhould ſo long live; but if he lived to the end of the nine years, the partnerſhip ſhould continue for any further term not exceeding twenty-one years, as *Pearce* ſhould deſire, on giving notice to continue it. It was provided, that notwithſtanding the death of *Plummer* it ſhould be carried on by his repreſentatives; and that if *Pearce* ſhould give that notice, he ſhould not have it in his option to pay off the repreſentatives of *Plummer*, and carry it on himſelf, but with them.

Articles of partnerſhip in trade ſubſiſt not for benefit of executors, unleſs ſo provided.

This bill was by the widow and repreſentative of *Pearce*, againſt the repreſentatives of *Plummer* for an account, and for liberty to carry on the trade with the defendants.

For defendants was cited *Godfrey* v. *Browning*, 7 *March* 1742. where it was held, that one copartner could not appoint a repreſentative to carry on the trade after his deceaſe; otherwiſe it might fall to the lot of an infant or perſon not at all fit to carry it on; and *Baxter* v. *Burfield*, *B. R. Paſchæ* 1746. where it was held, that a covenant to teach a boy his trade was reſcinded by the death of the maſter, on the ground that it was a bond to ſerve perſonally, and that he was not bound to ſerve an executor.

For plaintiffs: It might be ſo where it is a general partnerſhip; for then the death of one partner would determine it: but not ſo where a particular term has been agreed on: but if there was a caſe for that, it would not do here; becauſe the proviſion for the repreſentatives ought to be mutual, and ſhews, they did not guard againſt an infant's carrying it on. No caſe is cited to ſhew, that all partnerſhips muſt continue or conclude on the living or death of the principals. On the death of the maſter the boy cannot become apprentice by a courſe of repreſentation, as then it might be to the moſt ignorant perſon: but that is different from articles of copartnerſhip in a beneficial trade, wherein a right has been purchaſed for a period of years. In the caſe of *Huddleſton* one party was a lunatic, who could not carry on the trade; yet Lord *Talbot* thought himſelf bound by the articles, and obliged the other to carry it on for benefit of himſelf and the lunatick.

Maſter of the Rolls.

Conſidering the whole frame and deſign of the articles, *Pearce* was only admitted in eaſe of *Plummer*, and for his ſkill in the trade; and after that end was defeated by his death, it could not be the intent that any repreſentative of him ſhould have an opportunity to carry it on; as it might fall into ſuch hands as could not be of ſervice: and though it might come to the repreſentatives of one, and not of the other, that is by expreſs proviſion of the parties. Therefore on the articles, the plaintiff is not intitled to a decree to carry on the partnerſhip.

But as a general queſtion, the conſequence with regard to trade weighs greatly with me. It would be of ill conſequence in general to ſay, that in articles of partnerſhip in trade, where no proviſion for the death of either is made, they might ſubſiſt for benefit of an executor who may not have ſkill therein. The plaintiff could be of no uſe in carrying on the partnerſhip. *Plummer* wanted one whoſe knowledge he could confide in. The plaintiff, the adminiſtratrix, is intitled to one third, the infant to the other two ſhares. Her inteſtate might be indebted, and the aſſets wanted to be diſtributed. It is improper therefore to ſuffer ſuch a conſtruction, unleſs

the party provides for it. I remember that caſe in *B. R.* it was an action againſt the ſurety in a bond conditioned for performance of the articles: the maſter, to whom the youth was bound, died; the executors thought they might make ſome benefit of his time; and the view therefore was not to have him perſonally their ſervant, and to inſtruct him further in the trade, but to put that benefit of the infant's ſervice into their own pocket. The court, conſidering the inconveniencies attending apprentices or trade in general, if infants were obliged to ſerve executors or adminiſtrators for remainder of the term, although not of the ſame trade with the infant, determined it for the defendant, that the action would not lye. I alſo remember *Huddleſton*'s caſe; and am pretty certain (though not very poſitive) that he was under a great dejection of mind, ſo that a commiſſion was applied for; but before that queſtion came before the court, he had recovered himſelf, and was deſirous to carry on the partnerſhip: the court ſaid, theſe were accidents which could not be provided for; but that was no reaſon, when he had brought all his ſubſtance into trade, the other partner ſhould ſay, that a temporary diſorder intervening ſhould deprive him during life from going on with the buſineſs, and that he ſhould put the whole benefit of the partnerſhip into his pocket, without accounting for it. So that the court held, he had not forfeited the benefit under the partnerſhip, but ſhould, notwithſtanding that accident, be conſidered as partner. That caſe depended entirely on that circumſtance; and there was a proſpect of his recovery.

Apprentice not obliged to ſerve executor for remainder of the term.

One partner, notwithſtanding a temporary diſorder, conſidered a partner.

Thorne *verſus* Watkins, *October* 30, 1750. Caſe 18.

THE defendant was one of the executors of *Richard Watkins*, who reſided in *Scotland*, died there, and left his eſtate among his nephews and nieces, of whom the defendant was one; and was alſo adminiſtrator, and one of the next of kin of *William Watkins*, who was intitled to a ſhare of *Richard*'s perſonal eſtate; reſided in *England*, and died inteſtate.

Engliſh ſubject reſiding and dying here, and adminiſtration here, with debts or choſe in action due in Scotland; diſtributable as the reſt of his perſonal eſtate. *See Ambl. 25.*

It was inſiſted for defendant, that in accounting for *William*'s perſonal eſtate, ſo much thereof, as ſhould ariſe and accrue to his ſhare from *Richard*'s perſonal eſtate, ſhould be accounted for in a different manner from the reſt; *viz.* ſhould be diſtributable according to the rule of the law of *Scotland*, where that muſt be got in, and where half blood is not regarded: and it was compared to caſes, where it aroſe abroad, citing the caſe of *The Hans Towns* v. *Jacobſon*.

So if in other foreign countries.

Debts follow the perſon of creditor, not debtor.

LORD

LORD CHANCELLOR.

This is a ſtrange imagination; for which there is no ground, either from the nature of the property, or the manner in which that property is to be recovered. Theſe are two diſtinct rights; for the eſtate of *Richard* muſt be ſued in *Scotland*, recovered in that right. *William* reſided in *England*, and upon his dying inteſtate the defendant takes out adminiſtration, and by virtue thereof gives a bond to diſtribute according to the ſtatute of diſtribution here; that is, every part of the perſonal eſtate which came to his hands. What ground is there for what is inſiſted upon? Firſt, as to that which is to be recovered. If a man dies here, and adminiſtration is taken out here, where he has left a perſonal eſtate, and he has debts or part thereof abroad, in *France*, *Holland*, or the *Plantations*, that cannot be recovered in abroad by virtue of that prerogative-adminiſtration taken out here, but he muſt inveſt himſelf with ſome right from the proper courts in that country; as adminiſtration muſt be from the governor of the *Plantations*, if it ariſes there; which muſt be for form: and it is generally granted on foundation of the adminiſtration granted here; and then it muſt be diſtributed as here. But the preſent caſe is not ſo ſtrong as that now put; becauſe the defendant would not want that, but muſt ſue in the courts of *Scotland* to recover the perſonal eſtate of *Richard*; as repreſentative of *Richard* muſt recover it there: when it comes into the hands of the defendant, he will retain his own ſhare of *Richard*'s perſonal eſtate to his own uſe, and be accountable for that ſhare thereof belonging to *William*. So it ſtands as to the recovery of it; and therefore not ſo ſtrong or liable to objection, as it would, if neceſſary to ſue as repreſentative of *William* to get in any part of his perſonal eſtate. But that is not ſo material, as how it ſtands on the foot of the right. The perſon reſided and died in *England*; all his effects in *England*, and letters of adminiſtration taken out of the prerogative court of *Canterbury*. He had no right to any ſpecifick part of the perſonal eſtate of *Richard* whatever; only a right to have that perſonal eſtate accounted for, and debts and legacies paid out of it, and ſo much as ſhould be his ſhare on the whole account paid to him; which is only a debt, or in nature of a choſe in action due to the eſtate of *William*. Then it comes to this: a ſubject of *England*, reſiding here, and adminiſtration of his perſonal eſtate taken out here, with debts due to him or demands in nature of choſe in action in *Scotland* to be recovered by his adminiſtrator; whether that is to fall under a different rule of diſpoſition from the reſt of his perſonal eſtate. That never was thought of, and would create confuſion. And this queſtion relates not to the articles of union; which indeed preſerve the laws of the different countries, the juriſdictions, forums, and tribunals of each country: but this queſtion would be the ſame after, as before the union of the two crowns; and would be the ſame on a queſtion of this ſort ariſing in *France* or *Holland*,

Holland, whether to be diſtributable according to the laws of thoſe countries or of *England*. The reaſon is, that all debts follow the perſon not of the debtor in reſpect of the right or property, but of the creditor to whom due. Therefore in the caſe of a freeman of *London*, debts due to him any where are diſtributable according to the cuſtom; (otherwiſe it would be moſt miſchievous, if they were to follow the perſon of the debtor,) and then, when got in, it is diſtributed: and of that opinion I was in *Pipon* v. *Pipon*. This alſo came in queſtion in the Houſe of Lords lately, in a caſe ariſing on the lunacy of Mr. *Morriſon*; for there the queſtion was, whether the rule would be the ſame in the courts of *Scotland?* And the opinion was, that it would be the ſame; and it was taken, that it would be the ſame on a queſtion between a court of *France* and a court of *England*: it was the ſame; and different from the articles of union. This is juſt the ſame caſe in reſpect of that. As to the *Hans Towns* v. *Jacobſon*, it was the caſe of merchants, ſubjects of *England*, going to reſide at *Hamburgh*, and is different. It never was thought that on the death of a perſon having thoſe funds a bill muſt be brought by the next of kin of a particular part of that perſonal eſtate: the rule muſt be, that a bill be brought for the whole, according to what I laid down in *Pipon* v. *Pipon*; otherwiſe it would deſtroy the credit of the funds: for no foreigner would put into them, if, becauſe a title muſt be made up by adminiſtration or probate of the prerogative court of *England*, it was to be diſtributed different from the laws of his own country.

3 P. C. Abridg. 25.

The defendant therefore muſt account for the whole.

Alleyn *verſus* Alleyn, *October* 31, 1750. Caſe 19.

A Son was intitled, under the marriage-articles of his mother, to have 1500*l.* laid out in land to his ſole benefit after the deaths of the father and mother. The mother died; the father, by a ſecond marriage had a daughter; and having made a proviſion for her by a ſettlement, and by his will deviſed other parts of his eſtate to his daughter and her heirs, and the reſidue in truſt for his ſon for life, and then to the daughter with particular limitations and declarations of that truſt; and all his perſonal eſtate, except ſuch as was given to the daughter, to the ſame truſtees to pay all juſt debts and legacies; then to his ſon for life, with a bequeſt over to the daughter and her family.

Deviſe of reſidue of real and perſonal for life not a ſatisfaction for a ſum to be laid out in lands in fee by articles.

It was inſiſted this deviſe to the ſon was a ſatisfaction for the 1500*l.*

LORD CHANCELLOR.

No authority that ſuch a bequeſt as this, of the reſidue of real and perſonal eſtate, after payment of juſt debts, to teſtator's eldeſt ſon and heir, for life only, ſhould be conſtrued by this court a ſatisfaction for the 1500*l.* the ſon was intitled to under his mother's marriage-articles. If the ſon died in life of the father, leaving ſeveral children, there was no proviſion for them. So if he ſurvived, as he did, and had iſſue afterward. But it is ſaid, this intereſt the ſon had under the will, conſidering the income of the real, and clear income of the perſonal eſtate during his life, will amount, by computation, to as much as he could purchaſe an annuity for his life with his 1500*l.* but that is no rule, and cannot by conſtruction make a proviſion by will, for life only, a ſatisfaction for an eſtate in fee, to which the children are intitled under the articles, *Kentiſh* v. *Thomas*, and *Upton* v. *Prince* before Lord *Talbot*; where the abſolute property was given, not for life only: ſo in *Johnſon* v. Lady *Smith* before me. So that this cannot be conſtrued a ſatisfaction without any words in the will for it; and it would be contrary to the words in the will. This 1500*l.* therefore muſt be conſidered as a debt by ſpeciality on the teſtator's eſtate, to be retained by the defendant the ſon.

Caſe 20.

Glynn *verſus* The Bank of England, *Nov.* 3, 1750.

Bill by executors on loſs of notes in a liſt in teſtator's hand; the liſt not evidence here of his property, and left to law.

Rule of evidence the ſame here as at law.

A Bill was brought by the repreſentatives of *Nicholas Harding*, of *Kingſton*, againſt the defendants, touching ſeveral bank notes, which were ſaid not to be exiſting, but loſt. The bill was founded on the loſs; praying a decree for the payment upon offering to give ſecurity to refund and indemnify the defendants, in caſe any other claim ſhould be made on them. There was no proof of the actual loſs of theſe notes, or of their being in the actual poſſeſſion of the teſtator at or before his death; except as to a paper, in the hand-writing of teſtator, found after his deceaſe, containing a liſt of theſe, together with ſeveral other notes, which were marked as received by teſtator. The defendants therefore refuſed to accept the terms offered; which, they ſaid, they never did, but where it appeared to have been the party's property.

Lord Chancellor, thinking it a hard caſe, ordered it to ſtand over for the Bank to conſider of it; and afterwards in 1741. directed an iſſue to try whether theſe notes were the teſtator's property or not.

The iſſue never having been tried, a ſupplemental bill was now brought, and a petition to rehear; the length of time which had ſince paſſed, without any other demand made on the defendants, having

having made the plaintiff's caſe ſtronger for the preſumption of the loſs; but that, if the court ſhould think proper to direct an iſſue, it ſhould direct, that the above liſt ſhould be read in evidence to the jury; for whoſe conſideration it would be, whether it was proof of the teſtator's property, in like manner as the court has directed a man's own anſwer to be read before a jury.

Objected for the defendants to the reading this liſt here, as it would be making one's own hand-writing evidence for himſelf, contrary to a general rule. It is no more legal evidence of their being his property, than his own ſaying ſo would, if he had brought the bill; nor conſequently for thoſe in his place. The rule of evidence is invariably the ſame as at law. This court's directing an anſwer to be read at law has been from the peculiarity; for all the caſes, where that has been done, have been where there was but the oath of one witneſs contradicted by the anſwer on oath of the defendant; in caſe this court cannot make a decree for plaintiff, which rule is adopted from the civil law's not making a decree againſt the party on the oath of a ſingle witneſs: then where the court has been doubtful, and thought more light would appear on further examination, it has directed an iſſue, and then always directed the anſwer to be read as well as the witneſs examined, otherwiſe it would be abſurd. A demand on a bank, or goldſmith's note is merely legal; as your Lordſhip held in *Walmſley* v. *Child*, 11 *Dec.* 1749. and directed the plaintiff to bring his action. The loſs of bank notes is no ground to change the juriſdiction, becauſe the contents may be proved in a court of law as well as here; although loſs of a bond will change the juriſdiction; becauſe *Profert* and *Oyer* of the bond is neceſſary at law; not ſo of notes. The indemnity is not objected to; the only queſtion being as to the property, which was admitted in *Walmſley* v. *Child*. One of the great profits of the bank ariſes from loſt notes; and they think it of very great conſequence to oppoſe this, as it is under ſuſpicious circumſtances; for it is extraordinary, that ſo large a dealer as the teſtator ſhould not miſs them in his life if loſt. His executrix and reſiduary legatee, who ſurvived him half a year, put in an inventory, and no evidence of this being within it. The plaintiffs privately got an account from an inferior officer of the bank of ſuch notes as were not received by teſtator, and then produce this liſt; which, if allowed, will give room to colluſion. There is a diſtinction between thoſe that were paid and croſſed, of which the plaintiffs admit there were four paid by the bank, though there were more; which ſhews this is not a fair entry; and he, who has clearly delivered out four, may have delivered out the reſt; and therefore they may be out of his poſſeſſion before he died.

Ante.

For plaintiffs: This evidence is proper and legal; but, if not ſtrictly ſo, ſhould be received here; this court conſidering circumſtances

ſtances and evidence which is founded on equity, and will not leave it to the ſtrict courſe of law: as in the ordering an anſwer to be read at law. So where a witneſs, indifferent at the time, is examined on interrogatories, and afterward becomes intereſted, the court has ſuffered his depoſition to be read. No rule of evidence is univerſal, though it may be general. Such is the rule, that none can make evidence for himſelf; for in *Serle* v. Lord *Barrington*, an obligee's own entry of the payment of intereſt on the back of the bond, after his death was read to take off the preſumption from length of time; and therefore made that a debt, which otherwiſe would not have been a debt at all: as was held by Lord *Raymond*, and afterward in the Houſe of Lords, upon a bill of exceptions deſired by him; ſo that evidence under a man's own hand-writing may be given for himſelf. Shop-books of tradeſmen and brewers books have been read as evidence; as admitted in the caſe of Sir *Stephen Evans*, after a length of time. A parſon's books of his receipts of tithes, though no evidence in his life, may be produced for his ſucceſſor, as proof of the fact of payment, though not of the right thereto; the court conſidering an act, probable in its nature and by a proper hand, as not done to furniſh evidence to himſelf to his own benefit. Return of a rent-roll by a bailiff is evidence, that thoſe ſums were paid; a ſteward's book is evidence of the reality of a releaſe by his Lord; becauſe he could have no view himſelf, and was doing his duty. Entries by caſhiers and clerks have been held, after their deaths, evidence of payment; becauſe, being entruſted, they were the natural perſons to pay; and it will be preſumed they made juſt entries. On loſs of writings the law is very indulgent, admitting very looſe evidence. Invoices ſent from beyond ſea, are admitted, from the circumſtances, to prove property; and the ſeal of a notary publick allowed, if from beyond ſea, becauſe it cannot be proved in a better way: though not ſo of a notary publick here. Entries of births in family bibles, though entered for ſervice of the children, are never refuſed. It is impoſſible that the teſtator could have any view in this to the time of his death, or for the benefit of his executor. Mankind in general only enter in their books this ſort of property. Here is a ſtrong circumſtance, that twenty out of twenty-four bank notes are now unpaid; which number adds weight to the authority of this evidence. There can be no inconvenience in admitting it; the demand is ſuch, as that defendants run no hazard: whereas if not admitted, this will be an inſtance where juſtice cannot poſſibly be done for want of making the legal proof required; which might be in a very hard caſe; as of a widow unprovided for. Defendants own they have no right to the thing, though a legal demand, yet is the relief better here; like forgery, which though properly triable at law, this court has a concurrent juriſdiction for the ſame reaſon.

LORD CHANCELLOR.

I was willing to hear every thing that could be offered; becauſe undoubtedly the caſe is, by the length of time, in which no demand has been made on the Bank, made better for the plaintiffs; as the preſumptive evidence of the loſs of the notes (ſome of which have been iſſued 20 years) is grown ſtronger: yet this ſupplemental bill in nature of a bill of review is extraordinary; for it is no ſupplemental matter at all; becauſe ſuch matter muſt exiſt at the time of the decree made; and muſt be ſuch as could not be then known or made uſe of: whereas this ſubſequent length of time could not be ſuch a matter: therefore it is an improper method: though as to the petition to rehear, it is proper, the decree not being inrolled.

But the ſingle queſtion now before me is, as to the admiſſibility of this liſt as evidence; which, it is inſiſted, may be read by the repreſentatives of *Nicholas Harding* to prove, that at or about the time of his death he had in his poſſeſſion, or was intitled to theſe notes. It is inſiſted upon two ways; firſt, that it is proper legal evidence of this demand on the bank. Next, ſuppoſing it not ſtrictly ſo, that it is a ſort of evidence, this court ought to admit in a caſe of this kind; becauſe this bill is to have payment of the money not abſolutely, but on ſecurity to indemnify the Bank againſt any other demand for the notes; therefore the court ought to read this paper; and that it is ſufficient to found a decree of this court upon ſuch ſecurity.

As to the latter queſtion, whether there is any difference between this and a court of law; I am of opinion, there is not; and it would be of miſchievous conſequence to lay down a different rule of evidence in equity, from what it would be at law: the rules of evidence in general are the ſame in both courts as to the matter of fact; and this is a demand at law. The bill is founded on the loſs, and praying payment on the ſecurity; but that latter part does not vary the caſe as to the rule of evidence or queſtion of equity. A man is not intitled to bring a bill in equity in general for a ſatisfaction upon a note loſt: he may for a diſcovery properly. If it is a bond, it is for ſatisfaction and payment of the money; becauſe at law he cannot declare without a *profert* and giving *oyer* of the bond: but that is not the caſe of a note; for if loſt, he may recover at law thereon. There may be circumſtances indeed in which he may be intitled to come into equity in a caſe of this kind: but this is in general barely on the loſs of a note. It is ſaid, that by uſage of the Bank, eſtabliſhed among themſelves, they do on the loſs of a note pay the money upon ſecurity given to indemnify them; which practice of the Bank is made an equity; and as it is an eſtabliſhed practice by a great corporation, in which conſiderable part of

Evidence in equity as at law.

Difference between a bill on loſs of note and of a bond. On a note the demand is at Law.

the money of the kingdom is veſted, their practice might be a foundation for the court to go on, in caſe a ſufficient account is given of the property of the notes: but ſtill as to the right to the notes it is a queſtion at law. I do not ſee, that the rule of evidence differs from what it would be at law; or that it was improper in this court to direct that iſſue to try that at law, *viz.* the property; which was the previous queſtion to that concerning the loſs, which from circumſtances might be reaſonably collected. To ſhew that the rule of evidence is different, ſeveral caſes have been cited; the principal is that, where the court has ordered an anſwer of a defendant to be read at law in evidence to a jury; which could not be done by the rules of law. That has reſted ſingly on this; that if there is a bill on an equity in this court, and the fact on which it ariſes is denied by the anſwer, and the equity proved here but by one witneſs by the plaintiff, he can never have a decree, if it reſts on the oath of the defendant againſt one witneſs, and no more: but there are caſes, in which the court has doubted concerning the fact, and has directed a trial at law: then the objection by the defendant is very clear, that if it was ſent to law barely, the plaintiff calls his witneſs, the defendant cannot make uſe of his anſwer, and the plaintiff muſt recover, and therefore the court might as well reverſe their rule: to avoid which abſurdity the court ſays, the defendant's anſwer ſhall be read to the jury; for whoſe conſideration it will be, what credit the anſwer ſhall have: which is quite a diſtinct reaſon from what is inſiſted on here. Another caſe is, where a witneſs is examined on interrogatories, being at that time indifferent, and afterward by accident becoming intereſted in the thing in queſtion, the court has ſuffered his depoſition to be read; which has been done on juſt reaſon; becauſe his evidence muſt be taken as it ſtood at the time of his examination, which ſhould not be ſet aſide, unleſs it could be ſupplied by other evidence; and the caſes have been of that kind. In courts of law, if a ſubſcribing witneſs to a bond happens to be afterward repreſentative of the obligee, and is forced to bring an action, you can never examine the plaintiff there; it being impoſſible: but the rule is to ſuffer his hand to be proved in like manner, as if he had been dead. But theſe caſes depend on the particular reaſons, which attend the circumſtances of them.

Anſwer of defendant directed to be read to a jury. The reaſon.

Witneſs indifferent when examined, though intereſted afterwards, read.

Witneſs to a bond becoming repreſentative of obligee; his hand proved.

Yet if the plaintiff is in the right in coming into this court upon the offer of ſecurity, and lays before me legal evidence, I ought to read it; which brings it to the other queſtion. I am unwilling to give a ſtrict opinion; but thus far I will go. Several caſes are cited to ſupport it. The rule is, that a man cannot make evidence for himſelf. What he writes or ſays for himſelf, cannot be evidence of his right, and conſequently cannot be for his repreſentatives claiming in his right and place: although I will not ſay, how length of time may vary it; but otherwiſe it cannot be any more than for himſelf.

One cannot make evidence for himſelf.

himſelf. As to the caſes cited to prove that it may, the firſt is, that of indorſements by an obligee of the payment of intereſt; but that is different; it is not a caſe to prove the original right to the thing in demand at all. Indorſements by obligee of the payment of intereſt of a bond, are evidence againſt that obligee originally in the nature of the thing; and the other is only conſequential evidence to take it out of the preſumption ariſing from length of time, that he ought to have the benefit of it on the other hand; and in that caſe, I take it the indorſements were made and bore date within the 20 years; for if thoſe indorſements were dated after the expiration of 20 years, though they were evidence of the actual payment of intereſt after that time, they would not be evidence to take it out of the preſumption. Another caſe was that of tradeſmen and ſhop-books; which turns the other way; and no inſtance, where entered in a man's own hand, that they have been admitted after any length of time as evidence. At the time of making the act of parliament of *J.* 1. there was an opinion growing up, that after a certain length of time a man's own ſhop-books ſhould be evidence for him after the year; to prevent which was that act of parliament made; as I have been informed by Lord *Raymond* upon conſulting him. It was to take away that opinion, that after the year that might be evidence. It is true, there are ſeveral inſtances, where ſuch books, and brewers books, entered by ſervants uſed to make the entries, have been admitted, they being dead; but that is not the preſent caſe, which is of entries by himſelf in looſe papers of the dates, and numbers, and contents, of theſe bills. The caſe neareſt to this, and which may make this deſerve to be conſidered at law, was that, where the queſtion was, whether Sir *Biby Lake* ſhould be conſidered a truſtee for *Sir Stephen Evans*; which was tried in *B. R.* where the ſhop-books of *Sir Stephen Evans* were admitted to be read as evidence after a length of time; but they were entered by ſervants, and do not prove, that, if made by himſelf, they would be admitted. That went a great way, and was a new caſe. Another caſe was of receipts by a parſon of tithes, which has been admitted for his ſucceſſor, and goes a great way, but differs in ſome meaſure; the parſon knowing theſe entries cannot benefit himſelf nor his property, his repreſentative having nothing to do with the living, but for his ſucceſſor; who ſtands indifferent to him; nor is it to be preſumed, falſe entries would be made by him for his ſucceſſor. Then why ſhould not this be tried at law, as it has been directed? It ſtands juſt before me, as it would on the trial.

Indorſements by obligee of payment of intereſt evidence to take off preſumption of time.

Serle v. Lord Barrington.

Shop-books in teſtator's hand, not evidence.

Entries by ſervants after their death allowed.

Parſon's Receipts for tithes evidence for ſucceſſor.

It deſerves the conſideration of the Bank privately, how far they will inſiſt on this. It is true, part of the profits of the bank in trade ariſes on contingencies of this ſort from the loſs of notes; which is part of their gains; nor can a man come into the court, and ſay, they are not intitled to the money, that they are debtors to ſomebody,

and that he can ſhew a probability of title. The rule of the bank is, that if a man comes, and will make oath, that he was owner of the note, and loſt it, they will pay the money on ſecurity given to indemnify them. Conſider, how near this caſe comes. The perſon himſelf is dead; ſo that he cannot make the oath; then his executor makes oath (though it cannot be read here) that he believes his teſtator had theſe notes, and loſt them; and brings a liſt in the teſtator's own hand: can a man go farther? There is indeed a circumſtance, which might give the Bank a ſuſpicion; that among theſe notes there is a diſtinction made of thoſe that were paid and croſſed; the plaintiffs admitting that four have been paid by the bank; though the defendants ſay more; this, the Bank ſays, ſhews, it is not a fair entry; and that he, who had clearly delivered out four, may have delivered out the reſt, and therefore they may be out of his poſſeſſion, before he died: which may weaken it; but without that circumſtance I cannot ſee, how one can go further than an oath of belief they were in the teſtator's poſſeſſion, and then producing a liſt under the hand of a perſon of credit, as the teſtator is admitted to have been.

But I am of opinion this evidence cannot be admitted; not that it is by no means admiſſible; but that it ſtands before me juſt as before a court of law, and therefore go to law: although I know no inſtance of a court of law going ſo far.

The decree muſt be affirmed, and the ſupplemental bill diſmiſſed.

Sir *John Strange*, Maſter of the *Rolls*, happened to be preſent.

Caſe 21. Attorney General *verſus* Meyrick, *Nov.* 6, 1750.

At the *Rolls*. Sir *John Strange* Maſter of the *Rolls*.

Mortgagee in poſſeſſion under *habere* deviſes to a charity all money due by mortgage: it is within the mortmain act. 9 G. 2.

See A. Ves. Jun. 21.

OLIVER *Jones*, ſeiſed in fee, in 1724. mortgaged to *William Edwards* and his heirs for a ſum of money and intereſt; which not being paid in time, *Edwards* the ſon brought an ejectment, obtained judgment, and writ of *habere facias poſſeſſionem*; under which being in poſſeſſion he made a will in 1744, in which was this clauſe: Whereas I am poſſeſſed of certain ſums of money due by "mortgage and other ſpecialties, ſecured to me on the eſtate of "*Oliver Jones* together with other effects, my will is, and I give "all the ſaid money in any ways due by mortgage, notes, or *aſſump*-"*it*, on the eſtate of *Oliver Jones*, whereof I am now poſſeſſed by "*habere facias poſſeſſionem*, and alſo all my perſonal eſtate, in truſt "to pay my debts, legacies, and funeral expences; and afterwards

"that

" that the truſtees ſhould ſettle a place for the ſchooling and teach-
" ing ſo many poor boys, cloathing them, *&c.* and to pay the
" maſter for ſuch teaching, as the intereſt of the money I am poſ-
" ſeſſed of by ſecurities on the eſtate late of *Oliver Jones*, will ſup-
" port and maintain; and I deviſe to them all the money due on that
" eſtate, to be laid out at intereſt on good ſecurities to apply the
" intereſt thereof to the maintenance of the ſaid ſchool for ever."

This information was to have the charity eſtabliſhed and carried into execution. The heir at law of *Oliver Jones*, being a party, inſiſted by his anſwer to redeem; but had not yet done ſo.

For the relator: The mortgaged premiſſes are not deviſed, but only the money due by mortgage; and the heir at law of teſtator ought to be a truſtee for the charity; this deviſe not being within the intent or words of the *mortmain* act 2 *G.* 2. It is only a deviſe of the beneficial, not of the legal intereſt which deſcends to the heir: the lands are alienable; and this is given in money, not as land. Mortgages are always perſonal eſtate in this court; and the mortgagor, not mortgagee, conſidered as owner. This was liable to pay debts, and to be recoverable by an executor, without whoſe aſſent it could not be demanded by a legatee. It is doubtful, whether by deviſe of all one's eſtate, a mortgage will paſs. Though an alien is not capable of taking lands, it has never been determined, that he might not take a mortgage: ſo of a papiſt. Beſide ſecurities for money, are allowed to be given under the requiſites of the act by the firſt clauſe.

E con': This caſe is expreſſly within the meaning and proviſion of the act; the intent of which was to prevent that falſe charity ariſing from oſtentation and vanity: deviſing the money due on mortgage is a deviſe of the mortgage, *viz.* of all the beneficial intereſt the teſtator had; ſo that it amounts to the ſame. This is only to be conſidered as perſonal eſtate as between the executor and heir at law of mortgagee; and the reaſon of being ſo conſidered is from its not being the intent to realiſe it: but as to other purpoſes it is to be conſidered as land, like a deviſe of rents and profits of land, which is a deviſe of the land itſelf; and by the intervention of a court of equity this may be made land. It is to be conſidered as it ſtood at teſtator's death; and then any other future act, whether it is redeemed or not, will not alter the caſe. If mortgages on an eſtate are not within this ſtatute, it would be eaſy to elude it; for then the mortgagor, as he pleaſed to redeem or not, might make it within the act or not: this is like the popery act†; and will be conſidered by the court in the ſame light.

† See Roper v. Radcliffe 10. Mod. 167.

Maſter of the Rolls

Took time to conſider of the cauſe, which was heard laſt *July*, and now pronounced his decree.

In conſidering the general queſtion, whether or no this deviſe is within the act, two things are neceſſary to be inquired into; firſt, what right or intereſt would paſs by this will in the matter in controverſy, if that ſtatute was out of the caſe? Secondly, when that intereſt is ſeen, which would ſo paſs, then to conſider whether that does or does not come within the prohibition of that law?

Conſider the teſtator's right at the time of making the will, and alſo of his death. As it was a mortgage in fee, the legal eſtate deſcended on his death in the whole inheritance to his ſon and heir; who has recovered in ejectment poſſeſſion of the eſtate, and was intitled alſo to the equitable intereſt of the mortgage-money conſidered as perſonal eſtate, and capable to paſs as ſuch; and, being thus owner, made the deviſe in queſtion. The diſtinction made on the part of the relator, between a deviſe of mortgaged premiſſes and of the money due on mortgage does not ſeem well founded. By a gift of all one's mortgages, to *A.* the whole beneficial right paſſes to him; and, be the legal intereſt either in the heir or executor, as it is a mortgage in fee or term for years, each will be conſidered as truſtee for *A.* who will be permitted by the court to uſe their names to get the money, or make the pledged eſtate his own by foreclo-ſure. If it would be ſo in that caſe, then would it be equally ſo, though the phraſe uſed is *money due on mortgage*; where, unleſs the court conſtrues it to paſs the whole intereſt of the mortgagee, it will make it in effect a void deviſe, or at leaſt put it in the power of a third perſon, whether the deviſee ſhall take thereby or not. And it has rightly been compared to a deviſe of rents and profits, by which the land itſelf will paſs; for what is the land but the profits? In *Maundy* v. *Maundy*, *B. R. Trin.* 8 *Geo.* 2. it was held, that by deviſe of ground-rents the land itſelf would paſs. But if this is not ſufficient, it is farther obſervable, that the deviſe in queſtion is to them and their heirs of all the money due to the teſtator on the ſaid eſtate; which muſt either paſs the legal inheritance to them and their heirs, or, if that is ſtill left behind in his own heir, he will be barely a truſtee for them. Therefore by ſuch deviſe the whole intereſt would paſs to the deviſees; who would be intitled thereby to every right, the deviſor himſelf had to compel payment of the money, or to make the eſtate their own by foreclo-ſure.

The ſecond inquiry muſt depend on conſidering the reaſon and deſign of that law, and the clauſes therein; the title of which is to

to reſtrain the diſpoſition of lands whereby they become unalienable; and the preamble recites them to be prohibited by *Magna Charta*, *&c.* The act of parliament is not a total prohibition to give land or perſonal eſtate to be laid out in land, but only *ſub modo*; and any variation therefrom is declared to be a publick miſchief. Then ſuch a conſtruction ought to be made by the court, as is moſt effectual to repeal the miſchief, and advance the remedy. Therefore if this deviſe tends to let in the miſchief intended to be prevented, it is the duty of the court to guard againſt its taking effect. The only conſideration for the court is, whether the gift in this caſe comes within the prohibition or not: and I am of opinion, that this deviſe comes within the expreſs words and plain intent thereof. The deſign of the act was to lay a reſtraint on every method, whereby land might poſſibly come to ſuch hands, unleſs by the manner therein preſcribed: the firſt part therefore is abſolute; leaving however more liberty as to perſonal eſtate; but ſeeing that would not ſufficiently anſwer the intent of the legiſlature, if confined to land, it adds a prohibition as to perſonal eſtate, that it ſhould not be given to be laid out in the purchaſe of land. But was there no other way, whereby the intereſt in land might come to a charitable uſe? Yes, money due on mortgage was a charge and incumbrance on land; the payment of which depended on the pleaſure and ability of the mortgagor; therefore the parliament has by expreſs words taken in this by the third clauſe; the words of which, if they do not extend to the caſe of mortgages, I am at a loſs to know, for what purpoſe they were put in. The meaning was, that you ſhall not give to a charitable uſe that, which is or may be a charge on land, though not ſo at the time of the gift. Suppoſe a ſum of money is deviſed to be put out on a mortgage of freehold lands; is not this reſtrained by the act? If then a mere perſonal chattel may not, will it better the caſe, that at the time of the gift it is actually veſted? And how abſurd would it be in the parliament otherwiſe? Though by the firſt clauſe ſecurities for money are allowed to be given under the requiſites of the act, yet the ſubſequent words of that clauſe afford an argument, that mortgages affecting lands actually at the time of the gift, will not come within the meaning; as there may be other ſecurities for money not immediate liens on land, as debts, bonds, *&c.* I ſhould think, that on the firſt clauſe mortgages are prohibited; but if doubtful on the firſt, the words of the other clauſe take it in expreſſly; and on that latter clauſe chiefly I found my opinion; and it contains words not in the ſtatute of 11 *&* 12 *Wil.* 3. for preventing the growth of popery; and the caſes ſhew, the courts have made as liberal a conſtruction to prevent the miſchief as poſſible.

The information therefore muſt be diſmiſſed; but, being a new caſe, without coſts.

Bailis

Caſe 21. Bailis *verſus* Gale, *Nov.* 6, 1750.

Extent of the word eſtate in a will. Where a fee paſſed, by deviſe of all that eſtate he bought of Mead.

TESTATOR deviſes to his wife all that eſtate he bought of *Mead*, for ſo long as ſhe ſhall live; and different parts of his eſtate to two ſons ſeparately, and to their heirs; but if either ſhould die leaving no iſſue, the ſurvivor ſhould have the whole. In another clauſe, " I give to my ſon *Charles Gale* all that eſtate I " bought of *Mead*, after the death of my wife": in another, " I " give to my ſon *Charles Gale* the reverſion of the tenement, my " ſiſter now lives in, after her deceaſe; and the reverſion of thoſe " two tenements now in the poſſeſſion of *Joſ. Cook*." In another clauſe he deviſes to *A. B.* all the reſt and reſidue of his eſtate both real and perſonal.

For plaintiff. The queſtion is, what intereſt *Charles* took? Not only the land, he bought of *Mead*, paſſes, but the whole inheritance, his eſtate and intereſt. 2 *Lev.* 91. 1 *Mod.* 100. *Tufnel* v. *Page*, *Paſ.* 1740. *Ibbetſon* v. *Beckwith*, *Talb.* 157. *Burdet* v. *Burdet* 1732. 1 *Inſt.* 345. *A.* and *Carter* v. *Horner*, 4 *Mod.* 89. and *Lady Bridgwater* v. *Duke of Bolton*, 1 *Salk.* 236. Eſtate is ſynonymous with property; and there muſt be other words to reſtrain its generality. In *Lady Delves* v. *Corbet*, *Trin.* 1746. Sir *Bryan Brout. Delves* ſettled on his wife 1000*l. per ann.* rent-charge for a jointure; and having freehold eſtates deſcendable, tithes, and reverſions in fee expectant on failure of his iſſue male, deviſed to his loving wife all his freehold eſtate of any kind or nature whatſoever, which at preſent was in his power to diſpoſe of, and made her reſiduary legatee: a caſe was ſent into *B. R.* where the queſtion was, what eſtate ſhe took; and the whole court held, there was nothing to reſtrain the generality of the word eſtate; which took in every thing as well in reverſion as poſſeſſion. In *Barry* v. *Edgworth*, *Eq. Ab.* 177. Words of locality did not confine it to the thing. Where an eſtate for life was intended, teſtator has done it by expreſs words; and could not mean to give only a reverſionary eſtate for life to one of his ſons. In the reſiduary clauſe it clearly includes the eſtate in fee, and it is natural to mean the ſame in the other parts of the will.

Next as to the reverſion; it means clearly the eſtate in the land, the intereſt he had in it, and not the land itſelf: the reverſion is all the reverſion; for any part is as much the reverſion as any other; and in *Norton* v. *Ladd*, 1 *Lut.* 755. all the remainder gave a fee.

For defendant. Eſtate will not carry more than an eſtate for life, where it is taken in the very ſenſe of land, as here; it paſſing only

only the ſubject the teſtator bought of *Mead*. An heir at law is not to be diſinherited on an equivocal term; but is to be favoured; and takes, what is not neceſſarily deviſed away. *Johnſon* v. *Kirman*, 1 *Roll. Ab.* 134. It was a great while before any word was allowed to carry more than eſtate for life, unleſs *eſtate*, as *Cro. El.* 52. *totam illam partem* and *Skin.* 339. Afterward in *Goodright*'s caſe, 1 G. 2. on the word *hereditament*; and ſeveral other caſes. The only word, carrying both the eſtate of and in, is eſtate, where the word *my* is uſed, which is not here; nor will the law carry it farther. The ſame deſcription is uſed in a former deviſe of this very land, where he did not mean to paſs the whole intereſt in it: then the ſame words muſt be expounded in the ſame ſenſe; and where he meant a fee, he has uſed proper words of limitation; as in the deviſe to the other ſons.

As to the deviſe of the *reverſion*; it ſignifies, the land when it ſhall revert. There are no words of limitation; and no caſe where *reverſion* paſſes a fee. A reverſion is capable of being divided; and no reaſon why it ſhould paſs more than the word *land*, which will paſs a reverſion.

LORD CHANCELLOR.

This caſe ariſes on a ſubject, which admits of a very large field, and on which there is a variety of caſes, and a variety in thoſe caſes, as to the extent and force courts of law and equity have given to particular words on wills, on which this queſtion has ariſen. But there is no doubt at all as to the preſent caſe; and as to what was thrown out of favour in caſes of this ſort to an heir at law, it is to be laid out of the caſe; becauſe by this will, (whatever is the conſtruction) the heir is diſinherited certainly; which is clearly ſhewn to be intended by the general ſweeping deviſe of all his real eſtate.

On the firſt queſtion I am of opinion, that both the thing itſelf, and the eſtate, property and intereſt the teſtator had, paſſes by the deviſe. Several queſtions have ariſen in courts of law and equity on deviſes of this kind; but all the latter determinations have extended, and leaned as much as poſſible, to make words of this kind comprehend not only the thing given, but the eſtate and intereſt the teſtator had therein; and for a very plain reaſon: it commonly happened in wills made by the teſtator himſelf, being *inops conſilii*, not conuſaut of the law; of which kind this will is; and when it is ſo, it is well known, that when one gives, eſpecially among his children, ſuch and ſuch lands, deſcribing the lands only, he moſt commonly means the fee ſimple of it; unleſs where he gives it for life. Where he means to give a thing only for a particular intereſt, as for life or years, common ſenſe points out to add thoſe limiting

words; and the generality of people, giving without ſuch limitation, mean to give it abſolutely, though the word *heirs*, or ſuch words are not added. Where words of limitation are not added, the law is ſo tied down, that the rule is, it can give only an eſtate for life: but moſt frequently that is contrary to the intent of the teſtator, eſpecially when it is among children: but the law cannot help it; it muſt be ſo purſued: and it is better, that ſhould be ſo, than the rule broke in upon. But in the laſt caſes the court has endeavoured to make *eſtate* amount to a deviſe of the whole intereſt, unleſs ſome words reſtraining or limiting that general ſenſe, according to Lord *Holt*. *Eſtate* is admitted to be ſufficient to make a deſcription not only of the land, but the intereſt in the land. But it is objected, the pronoun *my* is not added: there was no occaſion for it. It was neceſſary, he ſhould uſe ſuch words as point out the whole intereſt he had in the land; which is ſufficiently done by the other words; for he bought of *Mead* the land and the fee ſimple in the land; which is agreeable to the conſtruction of the word *eſtate*; being ſufficient to deſcribe the thing and the intereſt therein, as it is in the caſe of all my eſtate. As to the objection from the deviſe to the wife, he did not intend a fee there: but that is no argument that he did not underſtand the word *eſtate* to compriſe not only the thing, but the intereſt and property in the thing. Perſons, not knowing the law, know when to add a reſtriction to what they give; therefore his adding that to his wife's deviſe ſhews, he was apprehenſive, this word *eſtate* would paſs the whole otherwiſe, and rather confirms and ſtrengthens the ſubſequent clauſe. But another argument may be drawn on this will: that the teſtator is dividing his eſtate among his wife and children; and it is inconceivable, he ſhould intend to give the proviſion, he meant for his ſon *Charles*, by a reverſion for life after the death of his wife; which greatly ſtrengthens the conſtruction of all theſe wills: and on this reaſon I am of opinion, this is ſtronger than *Ibbetſon* v. *Beckwith*; for there was a locality deſcribed; which is, what makes the objection to this large conſtruction: it makes no difference, whether it is *all my eſtate at Nothrwith Cloſe*, or *all the eſtate*; for it muſt be conſtrued with a *videlicet*, which is as local; and this is a deviſe of the ſame kind exactly. From this caſe alſo ariſes an anſwer to another objection, that the teſtator has uſed words of limitation, where he intended a fee; it is ſo there. Lord *Talbot*'s anſwer is, that it is a very incorrect penned will. I am of the ſame opinion in the preſent caſe, that no ſtreſs can be laid on differences of that kind. But another anſwer to that obſervation is, he has uſed *heirs* plainly to introduce the limitation over by way of croſs remainder. The word *iſſue* ſhews, how he underſtood the word *heirs*; and proves, that the drawer of this will meant by *heirs*, heirs of the body; and therefore as a word of reſtraining, not of enlarging. This therefore is

a ſtrong caſe as to the extent of the word *eſtate*, that he gave not only the thing but his intereſt in it, and conſequently a fee.

The next queſtion is as to the reverſion, whether that word paſſes a fee? I am of opinion, it does. The intereſt the teſtator had in it was the reverſion in fee, he had in himſelf expectant on thoſe leaſes he had granted, whether for life or years. Reverſion is a right of having the eſtate back again, (which creates an intereſt,) when the particular eſtate determines; and according to *Lut.* deviſe of a reverſion paſſes a fee: there was a deviſe of the whole remainder. *Reverſion* is deſcriptive of that right of reverter by way of eminence, that was in himſelf; conſequently there is no ground to ſplit or divide it; for giving the *reverſion* gives the whole reverſion, unleſs words are added limiting or reſtraining the intereſt. Here alſo occurs the other argument from his making a diviſion of his eſtate among his children, that it is extraordinary, he ſhould give his children only a dry reverſion, when the antecedent eſtate might continue longer than their lives; which ſtrengthens the argument, that they ſhould have as liberal a conſtruction as the law will allow.

Where a fee paſſed by deviſe of the reverſion.

As to the reſiduary clauſe; it has been held, that where *eſtate* is mentioned generally, accompanied with perſonal things, it ſhould be reſtrained to perſonal: but never where *real eſtate* is mentioned; for then the perſonal things mentioned ſhall be conſidered only an enumeration of thoſe ſpecifick things.

Deviſe of reſidue of eſtate with perſonal, reſtrained to perſonal: not if it was real eſtate.

Bennet *verſus* Muſgrove, *Nov.* 6, 1750. Caſe 23.

A Judgment-creditor of *Muſgrove*, having an execution by *elegit* againſt the land executed, and an inquiſition taken, brought a bill to ſet aſide a fraudulent conveyance made to the other defendant *Bradley*.

Bill lies for creditor by elegit to ſet aſide a fraudulent conveyance, whether he could recover at law or not.

Two objections were made: *1ſt*, That he ſhould not come into equity, but go to law, ſuppoſing, what the plaintiff ſaid, was true; for if a fraudulent conveyance, it is void by the ſtatute: next, that the plaintiff had not ſufficient foundation in point of evidence of fraud.

LORD CHANCELLOR.

A plain caſe to give the plaintiff relief; which is to be let in to the benefit of that, to which ſuch a creditor is intitled, though a creditor at large is not. But where a judgment is obtained, affecting it from the time and execution, he is intitled, becauſe that affects the reality of the land: and this, whether it is one kind of fraudulent

lent conveyance or another; for if it is by colluſion, he clearly may: but if it was obtained from his debtor himſelf by fraud on the debtor on or about the time, he obtained his judgment and *elegit*; he might, as ſtanding in the place of that debtor, come into this court to be relieved againſt that conveyance, and to have the ſame benefit of relief.

As to the firſt objection of the remedy, that he might have gone to law, and brought ejectment on the *elegit* and inquiſition: if he had, perhaps he would have failed at law by reaſon of a conſideration thrown in of 50*l.* a debt from *Muſgrove* to *Bradley* at the time, if that was proved true: though notwithſtanding that, it might be ſtill a conveyance made in fraud of creditors: and if that was done without delivery of poſſeſſion, ſuch a conveyance would not have been ſufficient, though part was a real conſideration; which was *Twine*'s caſe; for there was not a delivery. But be it as it may, whether he could recover or not, he is intitled to come into this court; the diſtinction in this court being, where a ſubſequent purchaſer for valuable conſideration would recover the eſtate, and ſet aſide or get the better of a precedent voluntary conveyance, if that conveyance was fairly made, without actual fraud, the court will ſay, take your remedy at law: but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment, and recover the poſſeſſion, they may come into this court to ſet aſide that conveyance: which is a diſtinction between actual and preſumed fraud from its being merely a conveyance.

Conveyance fraudulent if without delivery of poſſeſſion, though part a real conſideration.

Diſtinction between actual and preſumed fraud: in the latter left to law.

As to the laſt queſtion, there is ſufficient evidence of a fraudulent and colluſive conveyance to deceive the plaintiff and other creditors of *Muſgrove*, to protect this eſtate againſt them; and muſt be ſo far ſet aſide as fraudulent againſt the plaintiff's debt and demand by virtue of the *elegit*.

Caſe 24. Mogg *verſus* Hodges, *Nov.* 16, 1750.

Mortmain.

Aſſets not marſhalled to ſupport a legacy contrary to law: viz. lands to a charity.

JANE Churchill by will leaves her real eſtate to truſtees to be ſold; the profits to be applied to the uſes of the will: directs, that her debts and legacies ſhould be paid out of the perſonal eſtate; makes the truſtees executors; and leaves them all the reſidue of her perſonal eſtate and of that money, that ſhould be raiſed by ſale of her real, to be given by them in what charities they ſhould think proper, particularly recommending to them the hoſpital at *Bath*.

The truſtees agreed, that as all money ariſing from a real eſtate is to be accounted as real, the bequeſt was ſo far void by ſtatute of *Mortmain*, 9 *G.* 2. but deſired, that in compliance with the intent of

of teſtatrix the aſſets ſhould be ſo marſhalled, that all the other legacies ſhould be paid out of the real eſtate, and ſo the perſonal go to the charity, which legally might, according to *Dalton* v. *James*: and the common courſe of the court, where there are bond and other creditors, is to direct the bond-creditors to be paid out of the real eſtate, that the perſonal might be left to others.

Lord Chancellor thought himſelf not warranted to ſet up a rule of equity, contrary to the common rules of the court, merely to ſupport a bequeſt, which was contrary to law. It would be contrary to the expreſs direction of the teſtatrix, who deſires firſt, that her legacies and debts ſhould be paid out of the perſonal; that is the natural fund; and if the heir or deviſee of the real eſtate is ſued by a bond-creditor, he may ſtand in the place of that creditor to be reimburſed out of the perſonal. In *Dalton* v. *James* the legacies were particularly chargeable on both eſtates; and the court will always for the furtherance of juſtice, as in the caſe of debts, or, to comply as far as is conſiſtent with law with the intention of teſtator, in the caſe of legacies, when there are two different funds for payment of debts and legacies; order each particular to be paid out of that fund it legally may. But the aſſets cannot be ſo marſhalled to ſupport a legacy contrary to law.

Bath Hoſpital.

It had been argued, that the hoſpital at *Bath*, which was incorporated by act of parliament, had ſome particular clauſes in it contrary to the ſtatute of *Mortmain*, and conſequently in thoſe particulars not ſubject thereto.

Lord Chancellor held, that the words in that act were to be conſidered as in a charter: that the charter of incorporation was only granted by parliament to avoid expence to the promoters of that charity, who were forced to apply to parliament for ſome other powers, which the crown could not grant: therefore the charter was inſerted in the act, and is to be conſtrued as any other charter given by the King only. The clauſe mentioned was inſerted to avoid the trouble of applying for a licence in *Mortmain*, and was to be conſidered as ſuch a licence: that the governors are thereby impowered to take lands to ſuch a value, but ſtill with a *proviſo* that they are granted to them in the manner preſcribed by that law.

Several ſums having been left by the will to be laid out in lands for the uſe of particular charities, it was urged, that, though void as to the charity, it ſhould take effect ſo far as to be laid out in lands, and deſcend to the heir.

Truſt to take effect according to the whole intent, or not all all.

But it was decreed, that the truſt muſt either take effect according to the whole intent, or not at all: and as all money, ariſing from the ſale of a real eſtate, was ſtill to be accounted as real; ſo all lands, to be bought with perſonal, were ſtill to be conſidered as part of the perſonal. *Ex Relatione.*

Caſe 25. Lefebure *verſus* Worden, *Nov.* 16, 1750.

A man's own entry in book of accounts allowed as evidence, on inquiry before the Maſter, where all papers, &c. to be produced, not as original evidence of the demand, but as a claim in his life.

ON exceptions by defendants to the Maſter's report, a queſtion of fact, by whom two ſeveral mortgages were paid off; whether with the money of *Gabriel Armiger*, whoſe repreſentatives were the defendants, or of *Judick Armiger* his mother, to whom the plaintiffs were repreſentatives: the Maſter having reported the payment to be by the mother and with her money.

A deed, not proved in the cauſe was offered as evidence; it being ſaid to have been read before the Maſter; but there was no proof of that: but the deed by its antiquity proving itſelf, being about 33 years ſtanding; and it appearing material to the cauſe, and admitted on both ſides that the parties were not bound, by what was read before a Maſter, but might on exceptions be let in to read what they ſhould think material; it was allowed to be read.

An entry by *Gabriel* in his book of accounts was offered as evidence for defendants; for which was cited *Wilkinſon* v. *Hern*, 18 *January* 1744; but the reading it was objected to.

Lord Chancellor ſaid, it was common experience, that, though what is ſworn by an anſwer poſitively, cannot be read in evidence, yet the court allows weight to that anſwer ſo far as to take notice of it as a foundation for an enquiry. If then an anſwer, unſupported by proof, might have that weight, an entry in books of account of teſtator ſeems a proper ground for the court to let in and give attention to it ſo far as to be a foundation for an inquiry. It was now open, whether this was proper to be read as evidence; and he was doubtful about it. He inclined not to read it at preſent; but to go through the cauſe, hear all the other evidence on both ſides, and ſee how it bore connection with the ſeveral facts, and judge whether there was occaſion for it or not.

After hearing the evidence, he was of opinion, on the beſt conſideration, that this entry ought, under the circumſtances of the preſent caſe, (which is a caſe of inquiry) to be read; and it was deſireable to let in all lights in ſo dark a caſe: the court would judge of its weight afterward. It muſt be admitted, that, by the rules of evidence, no entry in a man's own books by himſelf can be evi-

Rules of evidence.

dence for himſelf to prove his demand. So far the courts of juſtice have gone, (and that was going a good way, and perhaps broke in upon the original ſtrict rules of evidence) that where there was ſuch evidence by a ſervant known in tranſacting the buſineſs, as in a goldſmith's ſhop by a caſhier or book-keeper, ſuch entry, ſupported on the oath of that ſervant that he uſed to make entries from time to time, and that he made them truly, has been read. Farther, where that ſervant, agent, or book-keeper has been dead, if there is proof that he was the ſervant or agent uſually employed in ſuch buſineſs, was intruſted to make ſuch entries by his maſter, that it was the courſe of trade; on proof that he was dead, and that it was his hand-writing, ſuch entry has been read, (which was Sir *Biby Lake*'s caſe) and that was going a great way; for there it might be objected, that ſuch entry was the ſame as if made by the maſter himſelf: yet by reaſon of the difficulty of making proof in caſes of this kind, the court has gone ſo far. There is no caſe, where an entry by the party himſelf has been admitted to be read, becauſe it was merely his own declaration, unleſs *Wilkinſon* v. *Hern*; of which he could not find he had taken any note; which might be from its being heard on exceptions, on which ſeldom any thing aroſe as matter of precedent; but it was read there on a different ground, *viz.* as evidence to ſhew the diſcharge or application of the money by the perſon making the payment; for it was a general payment, and the fact of payment not diſputed. But whether there was ſuch an authority or not, it is a reaſonable diſtinction, that though an entry in a man's own books may not be evidence originally to prove a right or the demand in queſtion, yet where the ſum is clearly made out to be paid out of his property, it may be evidence to prove the application of it, according to the rule, that whoever pays money, it muſt be received according to the direction and mode the payer impoſes on it. That was certainly going a conſiderable way, but does not come up to the preſent; becauſe there the payment was clearly admitted, and the queſtion was only concerning the application: here the payment is not admitted, but drawn by inference from another fact, that on that day the mother ſold the bank ſtock, ſhe received the money ariſing from the ſale thereof, which is argued to be ariſing from the ſale of the bank ſtock of the ſon, becauſe the original transfer proceeded from him, and that it was his money received by her: ſo that the payment made here is proved but by deduction from other circumſtances. But the ground that muſt be gone upon in this caſe is, that this is an inquiry before the Maſter; on which it is directed by the court, that all papers, writings, *&c.* ſhould be produced before him; and the intent was, that all kinds of circumſtances ſhould be produced; and therefore this paper is not to be conſidered as offered to prove originally the demand of the defendants; but to corroborate the other evidence offered for the defendants, and to rebut the plaintiff's evidence. The plaintiffs have proved and read a paper drawn up by the ſolicitor

Entry by ſervant or agent uſually employed therein, allowed on proof of his death and hand writing.

citor of the mother, and her own dictating, and a declaration of what was her demand on her ſon on her own part; which amounts only to her only declaration; no ſtronger than if it had apppeared in writing under her hand to be claimed by her. If that is admitted (which is admitted not as ſtrictly her demand, but as a claim made by her in her life, between her and her ſolicitor, of ſuch a ſum due to her), why may not the court on the ſame foundation ſuffer to be read this entry in the ſon's account, as a claim made by him to this ſum in his life, and ſtanding on the ſame foot with this other paper, and in a dark caſe where there is an inquiry before the Maſter, and all circumſtances directed to be produced? On that foundation only muſt it be read; not as original evidence of the demand; the weight of it will be judged of afterward.

Nov. 21. *Lord Chancellor* ſumming up all the circumſtances, delivered his opinion, that the ſtrength of the evidence was on the ſide of the defendants, that the mortgages were paid off with the ſon's money. The tranſaction was in 1721, brought on at a great diſtance of time after death of all the parties concerned, and was between perſons nearly related, having great confidence in one another, not keeping regular accounts between them, which occaſioned great obſcurity. And what appeared in the cauſe proved the wiſdom of the rule laid down in general, that money is not to be followed, from the uncertainty and maze the court was got into from being under a neceſſity of following it in this caſe; for the perſons having the legal intereſt, admitted themſelves to be truſtees barely; and as there was no declaration of truſt, the court was under a neceſſity of inquiring and finding by evidence, for whom they are truſtees; for it is not in the power of a perſon, admitting himſelf to be a truſtee only, to ſet up himſelf to be a judge for whom he is truſtee: but a court of equity muſt determine it. That depends on the queſtion, with whoſe money it was paid; which, on the beſt conſideration, appeared to be the ſon's.

The exception therefore was allowed.

Caſe 26. ——————, *November* 16, 1750.

On deviſe of guardianſhip parol evidence of father's intent as to education admitted.

PETITION on a difference of opinion between the guardians of Lord *St. John*, Lord *Luxborough*, and Mr. *Furneſs*.

A caſe was cited, where Lord *King* ſaid, parol evidence ſhould not be admitted in the caſe of deviſe of guardianſhip, any more than in a deviſe of land.

LORD

LORD CHANCELLOR.

As to the particular method of education, the court will receive parol proof of the intent of the father; receiving all ſorts of evidence to govern their direction.

Sedgwick *verſus* Hargrave, *Nov.* 22, 1750. Caſe 27.

At the *Rolls*. Sir *John Strange*, Maſter of the *Rolls*.

Huſband decreed to join, and to procure wife to join, in conveyance of her eſtate purſuant to agreement, or to refund a ſum received by the huſband; where the court would not make a perſonal decree on her.

GEORGE SEDGWICK, ſeiſed in fee of a cuſtomary eſtate of about 20*l. per ann.* in 1689. made a ſettlement of it; which recites, that in conſideration of a marriage lately had, and in performance of ſuch articles and agreements as were paſſed and made by him on concluſion of the marriage, and for making a jointure, and for 100*l.* paid him by his wife's father, he infeoffs truſtees for himſelf for life, to his wife for life for a jointure, and, after both their deceaſe, to the heirs of their two bodies; in default thereof to his right heirs. There was iſſue one daughter, who married the defendant *Hargrave*. In 1704. *Sedgwick* married a ſecond wife, and entered into an agreement to ſettle the eſtate on her for a jointure, and on the iſſue of that marriage; as appeared by a recital in a deed, made in 1710. when the family was under difficulties, and which was propoſed to make all eaſy between theſe two different ſettlements, by making a proviſion in eaſe of the father and daughter, and that the eſtate ſhould go, after the father's death, to his ſon by the ſecond marriage, the preſent plaintiff. This laſt deed recited the deed in 1689. and another in 1704. and took notice, that the father wanted 100*l.* to pay debts, and alſo to raiſe out of his eſtate 200*l.* to be paid to his ſon-in-law *Hargrave*, as a portion with his daughter, which is thereby declared to be in lieu of, and full ſatisfaction for, all her right, claim, or demand in or out of her father's eſtate or any of the premiſes. The money was paid, and the eſtate ſettled accordingly. In 1712. the father filed a bill to ſet aſide this agreement in 1710. *Hargrave* and his wife both joined in anſwer, and both diſclaimed all right whatever to the premiſes, and were willing to releaſe her right or title, or join in a conveyance, or do what the court thought proper, ſo as they were not obliged to refund any part of the 200*l.* This was in 1717. and nothing further was done in that cauſe. The father died about 1730. and the plaintiff enjoyed the eſtate without any claim: but in 1747. having occaſion to diſpoſe of it, he ſet it up; and the defendant *Rotherham* bid for it, and was conſidered as the purchaſer, having agreed for it: but receiving a hint of *Hargrave*'s claim, and finding he inſiſted his wife had a right to this eſtate, and that a good title could not be made, unleſs ſhe joined, he told

told the plaintiff, he would proceed no further in his purchaſe, unleſs this cloud was removed: whereupon the plaintiff brought this bill to compel *Rotheram* to go on with the purchaſe contracted for, and that *Hargrave* and his wife might ſet out the nature of their claim, and be decreed to join with him in making a title, or refund the 200*l.* with intereſt.

For defendants: There is nothing binding the wife in a court of equity to convey away her inheritance under the ſettlement in 1689. which muſt be taken as made in purſuance of articles before marriage, and conſequently her father only tenant for life; for though this was not a proper method of conveying a cuſtomary eſtate, yet being before marriage, a court of equity will conſider the agreement and intent, and the parties as under a ſtrict ſettlement. The wife is not bound by the deed in 1710, which ſhe did not execute, though made a party; and that was by colluſion between her father and huſband to put 200*l.* in his pocket. Nor is ſhe bound by the diſclaimer in her anſwer with her huſband in a former cauſe, in which nothing more was done. Next, if the huſband is to refund the 200*l.* it muſt not be to the plaintiff, but to the perſonal eſtate of the father; of which no repreſentative is before the court. He is indeed liable to the covenant, and let them purſue that.

Maſter of the Rolls.

As it ſtands on this deed of 1689. the father was certainly tenant in tail, ſuppoſing it was an eſtate proper to be conveyed by ſuch an inſtrument; but not being attended with the circumſtance required by the cuſtom, no legal right or intereſt could be thereby conveyed, but *G. Sedgwick* remains ſtill ſeiſed in fee; and though it is ſaid a court of equity will mold it according to the agreement and intent, yet, if no articles previous to the marriage, it is a mere voluntary ſettlement; and muſt have a legal effect if it can; but if not as a voluntary ſettlement, no party here are to have the benefit of it. The queſtion then is, whether ſuch articles were or were not entered into? None are produced. At this diſtance of time recitals will have weight; but if there were ſuch articles, it is odd, that notice ſhould be taken of them in this deed in the manner they are; not ſaying previous to the marriage; for then it might have gone a great way, in a deed of this antiquity, to preſume articles; of which, when once carried into execution, people are not ſo careful. Defendants ſay, they know nothing of ſuch articles; and from the ſubſequent tranſaction, and liberty taken by the father in ſettling a new diſpoſition in a different manner, a preſumption ariſes, that there were none: but whether or not, no legal intereſt could paſs by that deed to Mrs. *Hargrave* as iſſue of that marriage: and this being ſo ſmall an eſtate, it is not likely a man ſhould make ſuch a proviſion as never to have it in his power on any emergency. The deed in 1710. is a waver by that daughter

daughter of any claim on any eſtate of the father under either of thoſe deeds; and in no other light can it be conſidered but as an agreement between the parties to unfetter the whole eſtate; as they had it in proſpect, that theſe ſettlements were entangled, and might occaſion ſuits in law and equity, and to accommodate matters; and, conſidering the value of the eſtate, 200*l.* was a very ample proviſion for the daughter at that time. Suppoſing the conveyance in 1 89. had been ſtrictly according to the cuſtom, ſo that ſhe would be intitled to that eſtate as the only iſſue, yet ſhe was not to come into poſſeſſion until after the death of the father, who lived long after. But though ſhe is mentioned in the beginning of that deed in 1710. as one of the executing parties, ſhe never executed, nor even ſaw it: ſo that it was without her intervention. The ſubſequent covenants are for the huſband only; but it was a beneficial bargain for himſelf and his wife; having 200*l.* in preſent on parting with at moſt a reverſionary equitable intereſt; for a legal there was not. Had this been an agreement, the court could ſee it might be diſadvantageous to her, they would look with very jealous eyes indeed; the wife being ſaid to be a party, and not executing it, and then perhaps a a minor: but when it appears for her benefit, and that ſhe, when of age, joined in the anſwer to the father's bill, who conſidered that they had the better of him in the bargain, that ſhe had then a right underſtanding with her huſband, not complaining of the tranſaction, but careful that the 200*l.* ſhould not be recovered back, nor even now complaining of any coercion or impoſition by her huſband, as to her joining in ſuch anſwer; great weight muſt be laid upon it: eſpecially when ſhe had opportunity to apply to put in a ſeparate anſwer. From the father's death no claim was ſet up, until the plaintiff was obliged to diſpoſe of this eſtate: and now it is contended, that, though the huſband owns he is bound, the wife is not; that the eſtate is hers, and the plaintiff may come againſt the huſband as he pleaſes; which is a moſt unconſcionable defence. The juſtice of the caſe is, if in the power of the court, to take care the plaintiff ſhould have the benefit of this contract, and be enabled to convey to the purchaſer, who (for my part I think) might be ſafe in taking a conveyance from the plaintiff, from the long poſſeſſion, and no legal eſtate ſtanding out. But I have heard it ſaid, a title purchaſed under a court of equity muſt be like *Cæſar*'s wife, even without any ſuſpicion. If then, for his ſatisfaction, the court can clear it of this cloud, it were to be wiſhed; eſpecially as that agreement was for her benefit. How far can the court go? It cannot make a perſonal decree on her to join in a title; for notwithſtanding the huſband's power over the wife's eſtate by this cuſtom, yet is that attended with other circumſtances; for he muſt be actually admitted thereto in right of his wife, to give him a dominion; for if ſhe died before theſe circumſtances were compleated, her heir would be intitled: but no act has been done by her, that the court can ſay, is a

parting with her intereſt, ſo as to make a perſonal decree on her. I fear a bare decree on him to join, or procure his wife to join, may not anſwer the ends of juſtice. No doubt this 200*l.* ought to be refunded, if it is not performed; but to whom? The perſon who is to have this eſtate comprized in that agreement, *viz.* the plaintiff, in whoſe way the defendant has thrown this objection, which is an injury to him; and to him muſt the recompence be; for it cannot be conſidered as perſonal aſſets of the father, and ſo put into that pocket never deſigned by this agreement; for it was always deſigned as advanced to benefit the eſtate. On the whole therefore, I am not warranted to make a perſonal decree on her, but to decree him to join in a conveyance, and to procure her ſo to do; and to induce him I can add that alternative, that if he does not, in the time and manner directed by the Maſter, perform it, he ſhall accountto the plaintiff for this ſum.

This is the harſheſt and moſt obſtinate defence ever made; and no imputation on the agreement; for that is what I go upon.

Note; For plaintiff was cited a caſe, where it was held by the Lords, that ſuch a recital of articles in a marriage-ſettlement was not good againſt a purchaſer, though binding on the parties, volunteers, *&c.* and the decree, which held it binding on all, was reverſed, and two caſes, to ſhew the 200*l.* ſhould be refunded to the plaintiff, *viz.* Earl of *Coventry* v. *Carew*, in 1745. where Lord *Coventry* deviſed, that his truſtees ſhould exchange with *Lin oln-College* a manor, and deviſed the eſtate to come in exchange: the college refuſed; on which a queſtion aroſe between his real repreſentatives and deviſee; it being objected this was not the eſtate deviſed; but Lord *Hardwicke* held it ſhould go as he deſigned the other. Next *M'Kenſie* v. *Robinſon*, in 1742. where one deviſed to his brother a real eſtate in *Jamaica*, which proved to be evicted; a ſatisfaction being made in purſuance of a covenant by vendor of the eſtate, it was inſiſted the money was part of the perſonal eſtate of teſtator; but Lord *Hardwicke* held it ſhould accrue to the brother.

Caſe 28. Parſons *verſus* Dunne, *November* 23, 1750.

Wife muſt conſent or elect in court If abroad, perſons impowered to examine her ſeparately thereto.

ON Petition by *Dunne* and his wife, as to her money, the queſtion was, whether it was a ground to make an order thereon as to the method of carrying into execution an agreement now made an order of court, by which an account was ſtated.

The huſband and wife now ſubmitted to this agreement; and, being at *Paris*, had executed a letter of attorney to a perſon here to conſent.

LORD

Lord Chancellor ſaid, that would not do; the conſtant rule being otherwiſe. She muſt be preſent in court, to ſee whether ſhe conſented or not; or ſomething in nature of a commiſſion ſhould iſſue, like a *dedimus* in caſe of a fine.

The *Regiſter* mentioning a caſe where a woman, married to a ſecond huſband, was to elect, whether ſhe took by will of her former huſband, or by the cuſtom, her widow's part: both huſband and wife came into court to make that election, and differed; and *Verney* late *Maſter of the Rolls* referred it to a Maſter, to ſee what was moſt for her benefit. His Lordſhip ſaid, that was in point: and the conſequence otherwiſe might and would often be, that if the huſband might make an election to bind the wife, or agree to an account of the perſonal eſtate, the wife was intitled to, he might by colluſion take money into his own pocket to reduce her ſhare.

Let her therefore attend certain perſons named, who reſide in *Paris*, to be by them examined ſolely and ſeparately, as to her election to take by the cuſtom or not; and whether ſhe conſents to be bound by the account and agreement; which let them ſign and certify to the court, ſigned by her alſo.

Duke of Marlborough *verſus* Lord Godolphin, *November* 26, 1750. Caſe 29.

Lapſed legacy: Powers.

Deviſe of 30,000l. to his wife for life, and afterward to be diſtributed among his children as ſhe by deed, will, or inſtrument,

CHARLES Earl of *Sunderland*, in 1720. made his will, whereby he diſpoſes of his pictures and furniture at his houſe, deſires his debts and legacies might be paid; gives 30,000*l.* to his wife; and after ſeveral other pecuniary legacies, all the reſt and reſidue of his perſonal eſtate to his eldeſt ſon *Robert Lord Spencer*; "except ſuch "other legacies as I ſhall indorſe on the back hereof, in nature of a "codicil in my own hand-writing;" making him, Lord *Godolphin*, and others, executors of his will.

in nature of will, ſhould appoint: not veſted in children dying in her life, ſhe appointing by will, though feme covert at the time.

Ca. Brown
Higgs S.
Ves. jun. 570.

He afterward, by a codicil indorſed on his will without a date, directs the legacy, given by his will to his wife, ſhould be to her own uſe and benefit for and during the term of her natural life only; and after her deceaſe to be divided and diſtributed to and amongſt ſuch of his children, and in ſuch manner and proportion, as ſhe by any deed, or will, or inſtrument in writing in nature of a will, ſhould direct and appoint; and for no other purpoſe whatſoever.

He died in 1722. without revoking, leaving his Counteſs and ſeven children.

Upon the ſecond marriage of the Counteſs, a deed of ſettlement was made, wherein was an expreſs recital of the will and codicil; and a declaration that the intereſt of that 30,000*l.* ſhould remain to her ſeparate uſe; and then an expreſs covenant and agreement on the part of her ſecond huſband, that ſhe ſhould have power to make a will concerning the intereſt and improvement of that ſum.

In 1736, her ſecond huſband then living, ſhe made a will; thereby reciting that ſhe had before appointed 6000*l.* part of the 30,000*l.* for the benefit of her ſon in law Lord *Robert*, and 2000*l.* other part thereof for her daughter in law Lady *Morpeth*, which ſhe intended as part of what ſhe propoſed to give her at her death; ſhe ſays, this is her laſt will and teſtament, and that in purſuance of her power and authority given by the will of her huſband, (which with the codicil ſhe recites) and of all other powers, ſhe by this will gives, directs, and appoints, the remaining principal ſum to be paid to the ſeveral children of Lord *Sunderland* after mentioned in the ſeveral proportions after; to the plaintiff 2000*l.* to *John Spencer* 2000*l.* to Lady *Bateman* 3000*l.* and the reſidue, which ſhe computed to be 15,000, to Lady *Morpeth*, on condition that Lady *Morpeth* ſhould give ſuch a releaſe, as ſhould be tendered by her executors within ſix months after her (the Counteſs) Death, and diſcharge all her eſtate real and perſonal from the ſaid 30,000*l.* in default thereof the legacy before appointed for her ſhould be void; making Mrs. *Poultny* her executrix; and dying in 1749.

John Spencer and *Lady Morpeth* died in her life time after her making this will. Their legacies were claimed by the plaintiff as being thereby lapſed, as undiſpoſed and unappointed, and therefore part of the reſiduary eſtate of Lord *Robert*, whoſe executor the plaintiff was; under which right the plaintiff applied to Lord *Godolphin*, ſurviving executor of Lord *Sunderland*, for the payment of thoſe ſums; who thought proper to refer it to this court to ſettle the ſeveral claims ſet up by the ſeveral defendants to this money.

The bill therefore to have 17,000*l.* remainder of the 30,000*l.* beyond thoſe ſums which were effectually appointed and given by Lady *Sunderland* by virtue of her power, was brought againſt the repreſentative of Lord *Sunderland*, and of Lady *Sunderland*, to whom alſo adminiſtration had been granted to *William Spencer*, younger ſon of Lord *Sunderland*, who died ſoon after his father: there were alſo made parties Lady *Bateman* as one of the children; Lord *Carliſle* as adminiſtrator of his late wife Lady *Morpeth*; the Duke of *Bedford* as adminiſtrator of his late wife another of the daughters; and alſo the repreſentatives of *John Spencer*.

For plaintiff. To ſhew that the ſeveral ways, in which this is pretended to be appointed, cannot prevail, it is to be conſidered on the

the appointment by Lady *Sunderland*, and that of Lord *Sunderland* on default of appointment by her. Her diſcretionary power was very large as to the manner, terms and proportions; ſo that in whatever way ſhe choſe to do it, it muſt take effect thereby. It is done by a teſtamentary diſpoſition; compriſed in the ſame inſtrument, in which ſhe diſpoſes of her own property. She calls it a will: and it has been proved in the eccleſiaſtical court: ſhe might either by deed in her life or by will have given it to ſuch of the children, as ſurvived her; and though ſhe has not inſerted thoſe words, ſhe has in effect given on thoſe terms by giving it by will; which, whether it is to execute a power, or perform the orders of another, or a right to a perſon's own eſtate, means the ſame exactly. A will is ambulatory; only an inchoation of a will till the death of teſtator: although when it becomes a will, it may have a retroſpect to certain purpoſes: but, though in ſome caſes it may ſpeak ſooner than in others, in no caſe can it take effect till death of teſtator. It is a principle of law, that a deviſe of real or perſonal eſtate is void by dying before teſtator; founded on *Bret* v. *Rigden*, *Plo.* 345, *A.* that it is neceſſary to have a donee *in eſſe*; and is taken from the civil law; the reaſon in *Domat*, *part.* 2. *lib.* 4. being much the ſame as in *Plo.* A will is revocable from its nature; nor can it be made otherwiſe: for a clauſe to that purpoſe would be void, as it could not then be proportioned to the exigencies of families. Then it muſt be conſtrued as all other wills, and fall within the ſaid principle cauſed by conſtruction of law, and which is only ſaying, it was the intent of teſtator, that it ſhould not go to the perſons named, unleſs they ſurvived teſtator. Nothing is here to make it differ from a common will; for the ſubject matter of a will makes it not leſs ambulatory, *&c.* Its being an appointment in execution of a power prevents not its having all the incidents to a will. Though to ſome purpoſes appointee takes under the original power, and the legal operation is from the deed, giving the power according to Sir *Edward Clere*'s caſe, 6 *Co.* yet it is taken by the mediation of the power itſelf, and the court in conſidering his right, will conſider one as well as the other. It muſt have the proper qualities of the inſtrument referred to: be executed according to ſtatute of frauds. *Longford* v. *Eyre*, 1 *Wil.* 740. and *Wagſtaff* v. *Wagſtaff*, 2 *Wil.* 258. ſo that a power referring to a will means ſuch a will, as is proper to deviſe. On a power to appoint perſonal eſtate by will it muſt be a will proved in eccleſiaſtical court. *Roſs* v. *Euer*, 5 *July* 1744. where the bill for payment of legacies given by wife of defendant, who had previous to the marriage ſtock in truſt for the huſband for life, then to ſuch of the children as ſhe ſhould by will or writing under hand and ſeal atteſted by three witneſſes appoint; and in default of appointment, equally: ſhe died before her huſband; leaving a paper in her own hand; and declared this to be her will, and made an appointment thereby: but

it was not ſigned by her, nor atteſted. Your *Lordſhip* held, it was no will, becauſe not proved: which was attempted to be anſwered; becauſe it was only a writing of a *feme covert* executing a power, not ſtrictly a will, the huſband not conſenting to it; ſo that it could not be a will, nor proved in eccleſiaſtical court, only a power; and would operate by the original deed giving that power. Your *Lordſhip* held, even this ought to be proved; and that it was the ordinary practice to do ſo; and retained the bill, that the plaintiff might have opportunity to commence a ſuit in the eccleſiaſtical court. So that a power to execute by will means, it ſhall have the effect and be governed by the rules of a will: as on a bond before marriage to permit the wife to make a will; which ſhe does with the huſband's conſent; the legatee muſt ſurvive her. Tho' Lady *Sunderland* was under coverture at the time, ſhe had power to make a will, and reſerved it to herſelf before her ſecond marriage: nor could ſhe diſable herſelf. But it will fall under the other words, a *writing in nature of a will*; which is ſufficient to anſwer this power, and would do ſo in ſtrict legal pleading. *Tylley* v. *Pierce*, *Cro. Car.* 376. In *Rich* v. *Beaumont* by the Lords, 11 *Feb.* 1726, Plaintiff's wife had a power before marriage of appointing a real eſtate by deed indented executed in preſence of three witneſſes, or by her laſt will and teſtament duly executed: after marriage ſhe executes this power not by a will duly executed in the legal ſenſe of a will, but by an inſtrument in nature of a will: the huſband brought a bill to have the benefit of the execution of her power: Lord *King* diſmiſſed it; and held, the marriage a ſuſpenſion of her power; but that if ſhe had ſurvived her huſband, the power would have revived; which decree was reverſed, and a caſe ordered to be made and ſent from this court for the opinion of *B. R.* where it was held a good appointment: and that was of real eſtate. If Lady *Sunderland* had executed by deed, the intereſt would have abſolutely veſted in *nominee*, unleſs ſhe reſerved a power of revocation in the inſtrument itſelf: but ſhe has choſen an inſtrument, where there was no occaſion to reſerve ſuch a power; as from the nature of it ſhe might have made a new one immediately. Then why not teſtamentary throughout? for it is arbitrary to ſtop there. She was appriſed of the different methods, by which ſhe might execute; for having before appointed part by deed, her uſing a different method after, proves ſhe had a different deſign; that no intereſt ſhould veſt in this till her death. Powers being ſo frequent ſince the ſtatute of uſes, it is odd, there are not more caſes of this kind in the books: but the reaſon is, mankind have always thought a will in purſuance of a power revocable in its nature, and having all the properties of a will. Uſes are conſidered as powers: and whoever has the direction of theſe uſes, directs in ſuch a way, as the nature of the caſe will admit; if by will, as a will; if by deed, as a deed. Your *Lordſhip* has determined, a deed executing a power over real eſtate was a

conveyance

conveyance within the ſtatute of *Eliz.* ſo as to be fraudulent, becauſe it was a conveyance: then a deviſe to execute a power ſhould be within the ſame reaſon. In appointment of copyhold this accident muſt have happened often: no copyholder can make a direct deviſe, but muſt do it by ſurrender to uſe of his will; then it paſſes by the ſurrender, not the will, which is only an execution of a power. Though there is no determination either way, whether, by death of the deviſee in a will made in purſuance of ſuch ſurrender, it ſhould lapſe or not, yet no doubt but it would from the nature of the inſtrument. But this very point in queſtion has been determined by your *Lordſhip*, firſt in *Madiſon* v. *Andrew*, 27 *Nov.* 1747; where the appointment to a deceaſed daughter was held void; the intent being that it ſhould be given to her perſonally, and that the daughter dying before the appointment had no ſuch intereſt as was tranſmiſſible to her repreſentative. Secondly in *Oke* v. *Heath*, 4 *Nov.* 1748, which is ſtronger than this; your *Lordſhip* held, the appointment, though by a *feme covert*, was teſtamentary, ſhould be attended with the conſequences of a will, and be proved in the eccleſiaſtical court. *Burnet* v. *Holgrave*, *Eq. Ab.* 296, was then inſiſted upon; but did not hinder the determination: it appears a cauſe by conſent, in which caſes the information laid before the court is very imperfect: and beſides it is materially diſtinguiſhable; it being like the caſe on Lord *Thomond*'s will of a deviſe to Sir *William Windham* in truſt, where notwithſtanding the death of truſtee, *ceſtuy que truſt* was intitled. As to the particular caſe of Lady *Morpeth* it is on a condition, and to be performed by her perſonally; which ſhe could not execute, if ſhe did not ſurvive Lady *Sunderland*; nor is it material, that it may be performed *cy pres*. In *Wheedon* v. *Oxenham*, 8 *July* 1731. a man deviſed a ſum to his wife to be paid within ſix months after his death, provided ſhe releaſed all her right to dower on requeſt of his executors; and charged his real eſtate with it: the wife died after teſtator, and before the expiration of ſix months, without any releaſe or being required by the executors: her adminiſtrator brought a bill; and it was inſiſted, though ſhe did not perform the condition, her repreſentative might; yet Sir *Joſeph Jekyl* held, it was not due, becauſe the condition was not performed; it being in her election whether ſhe would execute it or not, it was contingent till her death, which ſhe would chuſe; therefore not veſted; and the bill was diſmiſſed. The proviſo here goes on a ſuppoſition, that ſhe ſhould ſurvive; which affects the whole.

Ante. *vol. 1. p. 57.*

Ante.

Taking it then for granted there was no appointment by Lady *Sunderland*, has the teſtator given this 30,000*l.* or any part, in default thereof? Clearly not in expreſs terms; as he would, if deſigned in all events to the children. She was under no obligation to any one as being a child, and had during life to do it. It was

prudent to leave it ſo; as ſome of the children might be otherways greatly provided for: but the reaſon was, as ſhe was ſtep-mother, to engage the affection of the children to her by motives of intereſt. She foreſaw, that on default of, or an ineffectual, appointment, his reſiduary eſtate would have a chance out of that 30,000*l.* and has in effect made an appointment by diſpoſing of the reſidue. It was not intended as a portion to the children, or an additional portion: nothing veſting, they could not tranſmit more right, than they had themſelves; which holds in the civil law. *Dom. lib.* 2. *tit.* 1. *ſec.* 10. She was to give to the children: if then it veſts in the repreſentatives, it veſts in perſons, to whom ſhe had no right to give. It is like the diſtinction between a legacy at a future day, and to be paid at a future day; veſting in one caſe, not in the other. In caſes of land, points of this kind have come before the court; as in the caſe put in *Daniel* v. *Uply*, *Latch* 9. which ſhews, none of the children can claim without appointment. This then is only ſuch an intereſt, as ſhould be delegated to them by their ſtep-mother, and muſt fall into the reſidue.

As to the ſecondary queſtion, whether this ſhall go among all the children in general, or thoſe only who ſurvived Lady *Sunderland*, that cannot ariſe but on a ſuppoſition, that the whole ſhall not go into the reſidue, but go in ſome manner to the children.

For defendant Lady *Bateman*. Who agreed with the plaintiff in the 1*ſt* queſtion: but as to the 2*d*, what was to become of theſe ſums in default of appointment, inſiſted, it was the ſame queſtion, as would ariſe on the whole 30,000*l.* on default of appointment; and muſt turn on the general view of the frame of the will and codicil. The primary intent was, that this ſhould be a further proviſion for the children: the ſecondary, that it ſhould be in ſuch a manner as to keep them in obedience to the mother: but that was only ſubordinate to the other; for the mother's power was only to diſtribute; which is ſuch a power, as this court can in default of diſtribution execute, and that equally, according to its general principles in default of execution. It was not inſerted with a view, that the mother ſhould be the giver, nor could it be the intent to put it in her power by making no appointment to defeat all the children, and let the whole go to the eldeſt ſon. The children took an original intereſt from the father in nature of a poſſibility veſting in them, ſubject to be defeated by act of the mother. By the will this 30,000*l.* is totally ſevered from the reſidue, and given to the mother; whoſe intereſt was abridged in conſideration of the children: thoſe children therefore, capable of taking and living at her death, ſhould be the objects, *viz.* the plaintiff and Lady *Bateman*. If an intereſt veſted in the children, it might be ſevered by them; which ſeverance would be good, if the mother did not execute the

power ſhe had. A mere intereſt depending on a poſſibility may be deviſed: as in *Cro. Jac.* 509. it veſted as jointenants, and muſt ſurvive to the preſent claimants, *Webſter* v. *Webſter*, 2 *Will.* 347. and *Cray* v. *Willis*, 2 *Will.* 529. in oppoſition to the notion in the civil law, where a legacy to ſeveral perſons makes a tenancy in common. A conſtruction ought to be made ſo as not to defeat either intent. If the word *ſuch*, as it ſtands, would exclude the children from taking any thing without appointment, that ought not to control what appears the general intent on the context, which courts of law will not ſuffer to be defeated by any inaccuracy of expreſſion in teſtator, but will tranſpoſe, ſupply, or drop words even in caſe of real eſtate to preſerve the intent: which if done here, an original intereſt will appear given to the children as a poſſibility actually veſted in them, though defeaſible by the mother. A ſmall alteration will do; only the poſition of the word *ſuch*; (which will ſtill preſerve the mother's power) reading it *after her deceaſe to and among my children.* Several caſes ſhew this no unwarrantable liberty. In *Surtees* v. *Barker*, 15 *G.* 2. *B. R.* a deviſe to a grandſon and his heirs; but if he died before twenty-one, or before marriage and without iſſue, remainder over: he died after twenty-one, and before marriage: the intent was held to be, that if he attained either of theſe events, he ſhould have the abſolute intereſt in the eſtate: that the court had a right to marſhal the words, and change the disjunctive *or* into a conjunctive; making it one intire event, on the failure of which ſingly the remainder over was to take place. In *Luxford* v. *Cheeke*, 3 *Lev.* 125. a much greater liberty was taken. So 4 *Leon.* 14. This is only a power of diſtribution in the mother; and like *Maſon* v. *Limbrey*, *Trin.* 1734, where one deviſed 2000*l.* to his brother, and deſired him at his death to give it among his children and the children of another perſon: the brother died in life of teſtator; and the queſtion was, whether without actual gift of the brother they were intitled to it, or thoſe who claimed the general reſidue. Lord *Talbot* held the children intitled, though no gift to them in default of appointment. In *Harding* v. *Glynn*, 7 *July* 1739, at the *Rolls*, deviſe of leaſehold and other chattels to his wife, but deſiring her at or before her death to diſpoſe of the ſame among his neareſt relations, as ſhe ſhould appoint: ſhe died without appointment; and it was held, ſhe had a power to diſtribute only, ſo that it operated as a truſt, and the relations were *ceſtuy que truſt*, and the power not being executed, it devolved on this court, and would be executed equally among the relations alive at the wife's death, and not *per ſtirpes* among the other next of kin as if undiſpoſed. Though teſtator has not given it in default of appointment, yet from the nature of the will itſelf it ſhall be ſo; the teſtator intending it to the children on one contingency as well as the other; the contingency not expreſſed being ſimilar to the other in 2 *Ven.* 363. though the words of the will tied it up to an expreſs contingency, the court decreed on the general intent. So in the laſt determination in *Jones* v. *Weſtcomb*,

B. R.

Ante. Avelyn v. Ward, March 19, $17\frac{+9}{50}$.

Ante. Avelyn v. Ward.

B. R. the deviſe over in default of appointment was held good, though the contingency was not expreſſed in the will, there being no reaſon againſt it: whereas here are poſitive reaſons why the teſtator ſhould intend it. But *Fonnerau* v. *Fonnerau*, 21 *May* 1745. is ſtill nearer: where *Charles Fonnerau*, having nine children by his firſt wife, and married to a ſecond, by whom he had none, deviſed 54,000*l.* to his executors and truſtees, ſeverally and jointly, to inveſt it in funds within ſix months, to pay the intereſt and produce to all the children of his late wife and of the preſent, that ſhould be born, when they attained twenty-one, ſhare and ſhare alike; and on the death of any of the children, to divide that part or ſhare among ſuch perſons as the child ſo dying ſhould appoint; and in default of appointment to divide ſuch part or ſhare among the iſſue of ſuch reſpective child; and if ſuch iſſue ſhould die before twenty-one, then to the ſurvivor of all his children. One ſon died without ever having any iſſue, and made the plaintiff executor. The queſtion was, whether that ſhare veſted abſolutely in him, or went over to the other children, to whom it was limited on default of iſſue; or ſunk into the reſidue? The plaintiff inſiſted, it was intended as a gift to the children, ſubject to be deveſted on having iſſue. Your Lordſhip held, it went to the ſurviving children, though the contingency, that happened, was not expreſſed; becauſe it appeared to be the general intent of teſtator to diſpoſe of his whole eſtate, and to take this whole fund out of the reſidue; and becauſe the ſhare of each child was given to the others on a contingency more remote than this; and no reaſon why it was not intended to go on this contingency as well as the others. Here is the like ingredient, to give it over on an event not expreſſed in the will. This codicil imports a general gift among the children; and all the words, implying a neceſſity of the act of the mother, are only powers of diſtribution over that; ſo that on default of appointment it went over to the ſurvivors, as in *Madiſon* v. *Andrew*. This whole 30,000*l.* is ſtrongly declared to be excepted out of the reſidue, like the caſe 3 *Will.* 40.

For defendants Lord *Carliſle* and repreſentatives of *John Spencer*. The principal queſtion in which they are concerned, whether the nomination by the mother of the ſhare, which each of theſe children was to take out of the 30,000*l.* is gone by their happening to die in life of the mother, muſt depend entirely on the principles of the common law of *England*; for in the *Roman* law received here, or the eccleſiaſtical law of this kingdom, there is not a word to that purpoſe. The reaſon of the *Roman* law being ſilent is to be found in *Swin. part* 4. *ch.* 11. *ſec.* 7. That law did not allow it; for that the will of *A.* cannot depend on the will of *B.* and therefore the nomination would be void: the law of *England* allows of it, not diſputing the *Roman* law, but diſputing the premiſſes; for, when appointed, it is the will of *A.* not of *B.* As to the eccleſiaſtical law or modern

modern caſes, nothing is to be found on that occaſion. There is no ground or mixture of equity on this queſtion; all the parties being equally meritorious: ſo that it is a mere legal queſtion, as if a deviſe to the mother for life, with power to diſpoſe of it among the children. It is neceſſary to aſcertain the terms; which being equivocal, make it dangerous: the word *power* has been made uſe of, and *give* and *deviſe* inſtead of *directing* and *nominating*; but this is not ſtrictly a power, nor attended with the legal conſequences thereof, though it goes by its name: ſo that no precedent on one ſort of power is applicable to another, for in one ſort of power it is an intereſt. Before the ſtatute of uſes all powers were conſidered without diſtinction as naked authorities; properly as powers, and attended with the conſequences: but that ſtatute has made an alteration in the common law as to that; for now powers are conſidered as a particular form or modification of property; part of the old ownerſhip, and liable to the conſequences of ownerſhip; and conſidered in courts of law as an intereſt; and then the relation to the time of giving the power does not hold; becauſe conſidered as an intereſt. In ſuch powers coupled with an intereſt of any ſort, to make leaſes, a jointure, to revoke or change, that is affected by the acts of the perſon, to whom given, he may releaſe it. 1 *Inſ.* 265 *B.* ſo in *Digge*'s and in *Albany*'s caſes 1 *Co.* and in *King* v. *Melling* a power to make a jointure was deſtroyed by a common recovery: whereas the contrary holds as to naked authorities. Where there is a power to appoint a ſum of money, as in *Shirley* v. Lord *Ferrars*, and *Bainton* v. *Ward*, 20 *April* 1741. in both which the appointment was by will, the court held the appointee could not take it, becauſe it was a voluntary appointment, which could not defeat creditors; and on the principle in 2 *Rol. Rep.* 173. as your Lordſhip laid down in Lord *Townſend* v. *Windham*, the gift to the appointee was aſſets to pay debts; which ſhould not be prevented by the death of appointee in life of teſtator. The principle of making it aſſets is, that the conveyance to him is void, conſidering it as a conveyance againſt creditors, who ſhall prevail, notwithſtanding death of appointee: ſo that it is only a particular form and modification of the intereſt. It is ſaid, the ſurrender of copyhold to uſe of a will, when the will is made, will be conſidered as teſtamentary, and lapſe: that point never has come in queſtion; which is extraordinary: if it had, the grounds, on which it was determined, would have been material. That might be determined to be a teſtamentary diſpoſition; becauſe it is that ſort of power coupled with an intereſt of the perſon deviſing. On feoffment to uſes it was not underſtood, that, if the party dies after the deviſe declaratory thereof, it ſhould lapſe. Feoffments to uſes are conſidered as powers now; they were before the ſtatute of uſes: and if it was underſtood, that it would lapſe, the caſe of *Bret* v. *Rigden* could not have been made a queſtion, nor argued, as it is in *Plo.* that conſequence not being alluded to there. The deviſee is in and claims

Ante 16 July 1750.

under the feoffment. But ſuppoſe that queſtion of the ſurrender was to ariſe; there is a diſtinction, that he is owner of the eſtate, and no act of his, which would not deſtroy the relation; which holds not in the caſe of other powers. So that the caſe of copyhold is diſtinct, being an intereſt; and powers coupled with an intereſt are conſidered as property. But authorities or naked powers are different; having all the conſequences, attended with all the rules the common law ever applied to powers in all the relations of it; the perſon exerciſing it being conſidered as a mere inſtrument. The fundamental maxim (which the law of *England* allows, though the civil law does not) is, that the acts done in conſequence and by virtue of an authority, and purſuant thereto, are the acts of the old proprietor, and of that day wherein he, in virtue of his ownerſhip, delegated that authority: and this maxim the law purſues throughout. There are inſtances of this ſort in *Plo.* ſo 15 *H.* 7. 11. *b.* referred to in 1 *Co. Digg*'s caſe, and *Albany*'s; and in 1 *Co.* 174. what is ſaid of the collateral power of *B.* whether the releaſe ſhould not extinguiſh it, is very emphatical, that it does not move from nor under him, ſo that he is a mere inſtrument, and is the reaſon why the act of *B.* cannot affect it. 19 *H.* 6. alſo, cited in *Latch* 43, is ſtrong to this effect; and *Tomlinſon* v. *Dighton*, 1 *Sal.* 239. and the reaſon, why theſe authorities or naked powers cannot be aſſigned, releaſed, forfeited, or extinguiſhed, depends on the maxim in 1 *Inſ.* 185. *Finch* 13. and *Capel*'s caſe, 1 *Co.* of the claiming paramount; ſo that no act of the deputy or inſtrument, who is to fix the proportions, can hurt the appointee; becauſe his title is prior to every act; which without any exception will be defeated by ſuch relation: and though it is by relation of law, it is the ſame as if it exiſted in fact, as if done immediately at the former time. *Finch* 70. In 1 *Co.* 176. *b.* is an inſtance of relation to the conſideration of a covenant; nor does the death of the party affect it. *Wood*'s caſe, cited 1 *Co.* 99. *a.* A bargain and ſale operates not, unleſs inrolled in ſix months: yet, if inrolled, it relates, avoiding all meſne acts; ſo that death of bargainor or bargainee before inrolment makes no difference. 2 *Inſ.* 674. The judges adhered to the conſequences of relation, that it ſhould be as if that day; and the death of the party has no effect, if within the time of relation. So judgments, entered up purſuant to warrant of attorney, are good by relation: ſo in aſſignments on acts of bankruptcy. Nor is there any exception to this in caſe of naked powers, as the preſent clearly is, disjoined from any intereſt in the mother; for that would make the argument and rule different; but ſhe is no more than bailiff or ſteward. The fund was no part of her antient property; neither moving out of or affecting her eſtate. She can neither gain or loſe by the execution or non-execution; nor could ſhe ſell it to a ſtranger; nor take money from a child for doing it; which would be ſet aſide as fraudulent. This is exactly *Tomlinſon*'s caſe, which was determined to be a collateral power; the only

only difference being, that was of land, this of money. It could not go to her reſiduary legatee or executor; nor be claimed againſt her repreſentatives, but the executor of teſtator. Then it is to be governed by all the rules applicable to naked authorities. The objection is that a legatee muſt be in *eſſe*, when the legacy is to veſt; ſo muſt a deviſee and grantee; and on that was *Bret* v. *Rigden* determined by analogy to grants as well as wills. But the anſwer is, theſe are not legatees of the mother; having no grant, gift, or deviſe from her; ſhe only ſaying that which the teſtator left a chaſm for, which ſhe fills up. If this appointment had been by inſtrument in writing with a power of revocation, (ſuppoſing in general that a power of revocation might be annexed) it is as much ambulatory and revocable until her death: and yet though they die in her life, they ſhall take; it ſhall relate, if ſhe dies without revoking. A will executing a power is different from a will paſſing an intereſt: Sir *Edward Clere*'s caſe. The latter muſt be a due, legal, proper will; this is not by a proper will, for ſhe was a *feme covert*; therefore it is by the other method given to execute this power, an inſtrument in writing, and may have a different effect from a will. The articles on her ſecond marriage have nothing to do with this power; taking no notice of the principal which ſhe was to appoint, but only the intereſt: ſo that this is to be taken as an inſtrument in writing generally; conſequently takes effect in the ſame manner, as if ſhe had made a common inſtrument without calling it a will, appointing theſe ſums to be paid after her death; which (it muſt be admitted) ſhe might have done, not calling it a will, and might have annexed a power of revocation ſo as to enable her to revoke that, and to execute the power over again; and this amounts to the ſame thing. The reaſon of the rule, on which lapſes are eſtabliſhed (that it is a gift to a perſon not in being at the time it ſhould veſt) holds not; that not being the caſe, when it is an execution of a power; becauſe they give nothing at all, only direct the gift of another. It is ſaid, teſtator intended by giving power to execute by will, that, if by will, all the doctrine of relation to the creation of the power ſhould be deſtroyed; and that the mother, when ſhe executed her will, intended, if they did not ſurvive, they ſhould not take: but neither has he intended it ſo. The teſtator's will is like to be diſappointed by this argument; and all the children diſinherited. If he had ſaid only by inſtrument in writing; ſhe might execute by deed or will; it not being in oppoſition to one or the other. If done by deed not ſealed or delivered, it would operate as an inſtrument in writing; ſo of a will: they are words of courſe of the drawer of the will. It is begging the queſtion, to ſay the teſtator knew that the conſequence of doing it by will would be, that if they died before her, it would lapſe, and therefore that it muſt be preſumed, he intended it; arguing his intent from what is the queſtion. He had no reaſon to think ſo: when he made his will, there was an authority

that it would not lapſe, *Burnet* v. *Holgrave*, and none to the contrary. The fund is reverſionary; not to take effect beneficially until after her death; the objects, all the children he had. Their outliving her is immaterial; it was not in his view or intent, that the gift ſhould be defeated by that contingency; nor was it reaſonable: the mother was young, and might live as long as ſeveral of the children. The reaſon of giving that authority was certainly to ſecure their obedience, and keep them dependent on her; and his adding negative as well as affirmative words ſhews, that when the mother made a difference among the children, he meant that difference ſhould take place. As to the mother's intent, ſhe could not do otherwiſe; unleſs ſhe had known what made the argument in this cauſe; that ſhe could have annexed a power of revocation to the inſtrument in writing: which, whether ſhe could or not, ſeems doubtful. She is confined to the children, and could not appoint to executors or others. If ſhe had intended it, ſhe would have provided for the event: whereas ſhe ſurvived ſeveral years, and made no alteration; and meant this diſpoſition ſhould take place. It is objected, that whatever was the intent of either, the rule of law is, that, if it is an appointment by will, it muſt lapſe: but no ſuch rule of law is applied to naked authorities. On the reaſon of the thing it is no maxim, that the parties muſt ſurvive the inſtrument, who is to declare the will of another; though there is reaſon for it, where it is the perſon's own gift. The time of making a will is material to ſeveral purpoſes: as to the power of teſtator, when made under age; ſo as to married women; ſo as to the thing to paſs. Not that the word *having* in the ſtatute of wills is the reaſon; but it goes on intent of teſtator, that he did not mean to give more than he had at the time. So as to the objects; as to a gift to *A.* and his children, it is material whether he had children at the time or not, according to *Wild*'s caſe. *Madiſon* v. *Andrew* is different from this; the power was fraudulently executed: it was not within the power by any relation: beſide, that was an appointment to herſelf, and then ſhe ceaſed to be a truſtee executing a power, which the court will never ſuffer to ſtand. *Oke* v. *Heath* is contrary to *Burnet* v. *Holgrave*; which, though heard by conſent, was a litigated cauſe: nor is it applicable; the power there being a modification of property, not a naked power; ſo that determination might ſtand; and ſo might the caſe of the copyhold: whereas this is a naked authority, in which the relation holds throughout, and cannot be affected, and it is conſidered as the act of the day. As to the laſt objection, in reſpect to Lady *Morpeth*, that, ſuppoſing it had veſted in her, ſhe loſt it by non-performance of the condition; that would hold equally if ſhe ſurvived but a little while, and did not do it. But one caſe is cited for it; which muſt have gone on other grounds. It is common for teſtator to oblige legatees to ſtand by his will, and releaſe within a time. The court never thinks the time material, only obliges them to make an election

after

after determination of the cases and points; but if they die in mean time, they are not to lose the intended legacies. The condition here in substance is performed; for the release may be given by her executors. Courts of law hold, that the substance of a condition may be performed; for which there are several cases in 1 *Inst.* that by forfeiture of the condition the estate is not defeated. Beside it is in nature of a condition subsequent; the counsel of the executors being first to tender the release; which is become impossible by the act of God.

As to the secondary question, if it vests in the children, it vests as tenants in common; which distinguishes it from *Madison* v. *Andrew*; where, what your Lordship went on, was, that the words were a jointenancy, and it would go to the survivors; but here if it vests, it must vest as a thing to be divided.

LORD CHANCELLOR.

As I am satisfied what decree I ought to make, it is not proper to put it off, merely for the sake of putting my thoughts into better order and method.

The general question, who has a right to these two sums of 2000*l.* and 15,000*l.* (as it is computed) appointed by the will of Lady *Sunderland*, made in execution of a power given by the will of her husband, depends on three considerations. 1st, Whether the representatives of Lady *Morpeth* and of *John Spencer*, who died in the life of Lady *Sunderland*, can claim, or be intitled to these two sums respectively? 2d, If they cannot, whether these two sums will fall into the residue of the testator's personal estate; or accrue and belong to all the children, and the representatives of such, as are dead? 3d, If they should belong to the children of testator; then to what species or division of these children: whether to all such as were living at testator's death, and the representatives of those dead, or only to those two surviving at death of Lady *Sunderland*?

The 1st depends on two things. First on the power and construction of the power given by the will of testator: next upon the act done in execution of that power.

As to the first, the testator gave the residue of his personal estate so as to shew an intent to dispose of his whole personal estate. As it stood in the will, it was an absolute legacy of 30,000*l.* to the wife. By a writing indorsed on the will, called a codicil, but with no new date, (and therefore it may be considered as part of the will) testator restrains that general legacy to one for life only, with power to dispose of it; which is the same, as if the whole had been inserted in

the will. This power is undoubtedly as large as the teſtator could poſſibly give to her, as to the inſtrument by which ſhe was to execute; but not large in reſpect of the objects, as to whom ſhe is reſtrained to and among the children. One ſide contends, here is no gift by the codicil, but to the wife for life with a power. The other, that a gift is made to all the children of teſtator, ſubject to the power of Lady *Sunderland*, by ſuch an inſtrument as is deſcribed, to divide and diſtribute among them, ſo as to exclude ſome, if ſhe pleaſed; but if not, that ſtill there is a gift to the children: but that laſt is not the conſtruction of the codicil. What was the intent of teſtator, in giving this legacy and power, can only be collected from the words of the will and the codicil; and it is plain, from both, that his primary intent was to provide for the wife thereby. To ſecure the reſpect and duty of the children to her, he reſtrains her eſtate, but gives it to none but to ſuch as ſhe ſhould appoint. It is admitted, that, if taken according to the words, to make any of the children take, there muſt be an appointment; but the method taken for the defendants to make this a gift to the children, is by inſiſting, that to make this preſumed intent of teſtator take effect, the words may be tranſpoſed. Suppoſe the word *ſuch* was tranſpoſed, I cannot ſee how it will vary the ſenſe or conſtruction of this clauſe; for the ſenſe and meaning would be the ſame, reſtraining the generality of the former words, making it a gift only to ſuch as ſhe ſhould appoint. But there is no colour to make ſuch a tranſpoſition. It is true, a court of law as well as of equity (and a court of equity has no greater latitude in conſtruction of wills, and tranſpoſing the words thereof, than a court of law has) will, to make ſenſe of a will otherwiſe inſenſible, and to make it take ſome effect rather than be totally void, often tranſpoſe words to attain the intent, that on the face of the will the teſtator had; which was *Luxford*'s caſe, 3 *Lev.* where the court did not make the tranſpoſition to let in more, or defeat the deviſees (which in no caſe do I know, that the courts have done) but it was to make the limitation ſenſible, the words being inſenſible, and to attain the meaning: but in no caſe, where the words are plain and ſenſible, is a tranſpoſition made in order to create a different meaning and conſtruction; much leſs to let in different deviſees and legatees in a will; which is a very different thing from the caſe, where the perſons to take are certain, and the queſtion is only concerning the conſtruction of the words to create the limitation or intereſt to be taken. But theſe are plain words: there is no deſignation to take under this will, but ſuch of the children as ſhe ſhould appoint; and no perſon can be aſcertained under this will until ſhe has made ſuch appointment. Indeed the words want no conſtruction; and if the court ſhould put a different conſtruction, and tranſpoſe, as contended for the defendents (which ſtill could not do for them) it would be making a new will; for teſtator intended none of the children ſhould take but from the appointment of Lady *Sunderland:* and in this it

Tranſpoſition of words in a will, to make a limitation ſenſible, but not to let in different legatees.

is like the caſe cited out of *Latch* 10. Therefore I am of opinion, that by this codicil, or this part of the will compriſed in the indorſement, here is no gift to the children of teſtator, otherwiſe than as they might take by execution of the power by her; and conſequently the legacy is a mere gift to her for life with power to diſpoſe, *&c.*

This leads to the other part of the conſideration of the firſt queſtion, *viz.* the act done by her in execution of the power, and the conſequence thereof.

She had ſeveral ways to execute it, by deed or inſtrument in writing, or by a proper will: but I am of opinion, whichever way ſhe took, to make any of the children of teſtator take by virtue of it, it muſt be a compleat act done by her; and that an imperfect act in execution of this power would not make any part of this money veſt in any of the perſons to take under it; for it is admitted by defendant's counſel, there is no purchaſer, no greater merit in one than the other; all being volunteers; and therefore no ground to ſupply any defect in the execution of the power. She has choſen to execute it by will: and two of the appointees therein dying afterward in her life, the queſtion is, what under theſe circumſtances is the effect of the execution of this power as to them; whether their repreſentatives can take the ſums appointed? To determine it one thing is neceſſary to be ſettled: *viz.* the nature of the inſtrument by which the power is executed. The plaintiff inſiſts, it is by a will: the defendants, that it is by a proper will, for that ſhe was a *feme covert* at the time; but by an inſtrument in writing, which may have a different effect from a will. I am of opinion, that this act of her's in execution of her power muſt be conſidered as a will, and may be truly ſo as a proper will in this cauſe: but if not, ſtill it may as a writing in nature of a will; and then it will come juſt to the ſame thing as to the preſent queſtion. A feme covert may make a proper will, proved in the eccleſiaſtical court, with the aſſent of her huſband, according to the expreſs reſolution of *Mariot* v. *Kinſman*, *Cro. Car.* 219. where it came in queſtion upon a bond in pleading. Then, whether there has been ſuch aſſent in this caſe, depends on the deed of ſettlement made on her ſecond marriage. I am of opinion, it does amount to a ſufficient aſſent to her making a will concerning this 30,000*l.* It is ſaid barely to relate to the intereſt: if it had done ſo, when there is an expreſs recital of the will and codicil, and the principal and intereſt ariſe under that will, and ſhe was only to take the intereſt, I ſhould have thought, it was an aſſent to a compleat will: but it goes farther; for the word *improvement* does not take in intereſt only but improvement of the capital, which is part of the principal, and would go to be divided as the principal; for it is eſtabliſhed, that the increaſe and riſe in value

Will by a feme covert good with aſſent of huſband.

of

of the principal ſhall go to the principal, and not go to the tenant for life in being. But, ſuppoſing this not a proper will, ſtill it muſt be conſidered as an inſtrument in nature of a will; which ſhall have the ſame conſequence as if a will according to the conſtruction of the court. Then taking it either way, as a proper will or inſtrument in nature of a will, I am of opinion, that neither the repreſentatives of *John Spencer* or Lady *Morpeth* could take any thing by this execution of the power, unleſs it veſted in their teſtator or inteſtate, only derivatively, and through them. It is certain, that an executor or adminiſtrator cannot take by virtue of that repreſentation any thing, but what firſt veſted in the teſtator or inteſtate: which brings it to the queſtion, whether by this execution of the power any thing veſted in them in their lives. It is plain, that by virtue of a will or inſtrument in nature of a will, no legacy or gift can veſt till death of teſtator; and admitted, that if this was a gift of Lady *Sunderland* and a legacy from her, ſo that the children were to take by or under her, it would be ſo; for then it is admitted, the will is not compleat till death of teſtator: but it is inſiſted, that this being in execution of a power, nothing is taken under the inſtrument, by which the power is executed, or under the perſon executing, but under the giver of the power, and as legatees in the will of the teſtator: which is true to certain purpoſes, but holds not to the extent contended for on the part of the defendants, that is, not to ſhew that theſe two legacies or ſums of money veſted by virtue of the execution of this power in the children in their lives; for to that only can it be material. There is no caſe, where that has been ſaid to be under a will; whether that will operates by way of giving a legacy or intereſt derived from the teſtator in that will, or by way of execution of a power, or inſtrument in nature of a will, which is the ſame; for ſtill it is a teſtamentary act, and the law ſays, that a teſtamentary act is only inchoate during life of teſtator, from whoſe death only it receives perfection: being till then ambulatory and mutable, veſting nothing, like a piece of waſte paper, according to the doctrine in *Bret* v. *Rigden* in *Plo.* where *Manwood* does not argue, that the will could have effect during life of teſtator, but only that the heir ſhould take by purchaſe as deviſee in the will, that the will might take ſome effect. The caſes put for the plaintiff are very material, *viz.* of a will of land in execution of a power, and the word *will* generally uſed, (which before the ſtatute of frauds would be ſufficient, if it was a will not executed by any witneſſes) it is determined, that a will to paſs lands by virtue of a power muſt have the requiſites in that ſtatute. It is the ſame as to a power to appoint perſonal eſtate by will; unleſs there are other words, which are contended for to give a larger manner of executing the power, it muſt be ſuch a will, as will paſs perſonal eſtate. So is the caſe of copyhold lands very material; not that there is any authority; but as it is a thing, which muſt have often happened. Copyhold lands are ſurrendered to

Will to paſs lands by virtue of a power, muſt be executed according to the ſtatute of Frauds. *Contra* 3. Cha. Cas. 69. but ſee acc. 2 Vern. 598. 1 Wms 740. 2. Wms. 2. Wms 258. & ſee further post. 383.

to the uſe of a will; the ſurrenderer makes a will, and appoints the uſes thereof: the law ſays, the lands paſs by the ſurrender, and the will is only directory of the uſes: though the lands are ſo appointed, if the appointee died in life of teſtator, it was never thought, he could take benefit of it: which muſt have often happened, conſidering the number of ſuch wills: and yet it was never contended, that it would veſt in appointee dying in life of teſtator; becauſe the act was not compleat; it being no will till his death; and conſequently at the time it ſhould veſt, there is no perſon to take. So if a power is given by deed to appoint lands by will; and the perſon, to whom the power is given, makes a will, and gives the lands to *A.* and his iſſue; the law ſays, that, though ſuch appointee takes under the power, yet the execution of the power being by will, it ſhall receive the ſame conſtruction as if a deviſe of lands, *viz.* an eſtate-tail. So if it had been to *A.* for ever, that would have been an eſtate in fee. It was never doubted, but that the conſtruction of the words would be the ſame exactly, as if he took ſtrictly and properly under the words of a will; and indeed it is repugnant to the nature of the inſtrument, that any perſon ſhould take, or have any thing veſt, by will in life of the teſtator: and every perſon, claiming under the execution of a power, muſt claim not only according to the power, but the nature of the inſtrument by which that power is executed; and therefore a will in execution of ſuch a power (ſuppoſe it was of lands) would be alterable or revocable according to the ſtatute of frauds by cancellation or any of thoſe methods, as a proper will would be; becauſe it is the nature of the inſtrument, which cauſes that. Suppoſe ſuch a power was to be executed by deed only, it might be as well ſaid, that the party to take under the execution of that power ſhould take by an incompleat deed; as in this caſe by a writing not compleat till death of teſtator; there being as great an inperfection in one caſe as the other. If this was to be taken as an inſtrument in writing generally, and to have the ſame effect as if ſhe had made ſuch a common inſtrument without calling it a will, appointing this payment after her death, as has been argued, that would change the nature of the inſtrument, and the intent of Lady *Sunderland:* the conſequence would be, that it would be irrevocable; for it is revocable only by the nature of the inſtrument itſelf: but turn it into another inſtrument, neither a will or inſtrument in writing in nature of a will, it is not revocable; for it is determined, that notwithſtanding under ſuch a power ſhe might have executed it *toties quoties*, have reſerved a new power to herſelf, and might revoke, yet if ſhe does not reſerve a new power, it is irrevocable; which was the reſolution of all the judges in *Hele* v. *Bond* in the houſe of Lords. There *Hele* had a power in a deed to revoke, and appoint new uſes, as often as he pleaſed: he executed a deed, and revoked; and ſo a ſecond and third time; and the queſtion was, whether this laſt revocation was good? It was held not

Copyhold ſurrendered to uſe of will: and appointee dying in life of teſtator.

Appointee under a power muſt claim alſo according to nature of the inſtrument.

Power of revocation, and to appoint new uſes: expreſs revocation muſt be reſerved, or it is executed.

See acc. post. 211.

not good for want of an expreſs revocation; that this power amounted to no more than a common power of revocation expreſſed in a great number of words; and therefore the party could not revoke *toties quoties* by virtue of this original power of revocation: but it enabled him to inſert a new power of revocation, if he pleaſed; which not having done, he had executed his power. So if I ſhould hold this paper to be neither a will nor inſtrument in nature of a will, it would be an inſtrument irrevocable by her; which would undoubtedly be contrary to her intent. It is only revocable from being a will or in nature of a will; and if ſo, it is equally incompleat till her death; conſequently nothing could veſt in either of the legatees till her death; at which time, it is a principle of law, there muſt be a donee or appointee to take: whereas here they were not then in *rerum naturâ*, and conſequently no legatee, donee, or appointee, (call it which you will) to take at the time the thing was to veſt. From this conſtruction of this paper the caſe in *Hob.* of *Kibbot* v. *Lee* is material, *viz.* that this, whether as a will or inſtrument in writing in nature of a will, is a declaration in law of Lady *Sunderland*, that it ſhould take effect only from her death. But to this it was ſaid, that in the preſent caſe it is otherwiſe: becauſe the appointee muſt take under the power, and as if named in the power; and that it was a gift of the teſtator in his will, ſhe being only an inſtrument: that the whole reverts back to the power, under which merely they take; which relation will overreach the death of theſe two parties, both being living at the death of teſtator, and then it may be conſidered as veſting in them in their lives; which I deny. I admit the principle, that, where a perſon takes by execution of a power whether of realty or perſonalty, it is taken under the authority of that power: but not from the time of the creation of that power. There is no caſe, that the relation ſhall go back for that, which is quite of another nature: and that is the point, which muſt be contended for here, that they muſt take by relation ſo as to make them take from the time of the creation of the power; for which there is no authority: and that would be unreaſonable. The meaning, that the perſons muſt take under the power, or as if their names had been inſerted in the power, is, that they ſhall take in the ſame manner as if the power and inſtrument executing the power had been incorporated in one inſtrument; then they ſhall take, as if all, that was in the inſtrument executing, had been expreſſed in that giving the power. So is it in appoinments of uſes. If a feoffment is executed to ſuch uſes, as he ſhall appoint by will; when the will is made, it is clear, that the appointee, *ceſtuy que uſe*, is in by the feoffment: but has nothing from the time of the execution of the feoffment ſo as to veſt the eſtate in him. The eſtate will veſt in him according to the nature of the act done, and appointment of the uſe, from the time of the teſtator's death. This therefore is not a relation ſo as to make things

Appointee takes under the power, as if inſerted therein: but not ſo as to take by relation from creation of the power, as in aſſignment on commiſſion of bankruptcy or in bargain and ſale, inrolled.

Feoffment to uſes.

Vide ſee article Mar. my Case Book vol. 2. p. 216. & p. 233. Fearne on Contng. Rem. 3d. ed. 57. & 4th ed. 99. 1. Ves. Jun. 510.

things veſt from the time of the power, but according to the time of that act executing that power; not like the referring back in caſe of aſſignment in commiſſion of bankruptcy: that is by force of the ſtatute, and to avoid *meſne* wrongful acts. The caſe was put of a bargain and ſale; which was ſaid to be like this of a will or inſtrument in nature of a will. A bargain and ſale, when acknowledged and inrolled, has relation to the time of execution; and if the grantee dies within ſix months, and afterward it is acknowledged and inrolled, it is good: that is, becauſe it is a collateral act required by act of parliament, and not ariſing from the nature of the inſtrument itſelf. Conſider the conſequence, if this was otherwiſe: that by ſuch a will or inſtrument in nature of a will, executing ſuch a power, any thing ſhould be held veſted in teſtator's life, and that the reference to the power ſhould not only be a reference to the ſubſtance of the power, but to the time of creation; it might be as well ſaid, that Lady *Sunderland* might have appointed this money to them, if they had died before her making the will; for it is juſt the ſame thing; and the caſe of the bargain and ſale, if applicable, would hold equally; then the conſequence would be, that ſhe might execute this power by giving all, or greater part, to herſelf; for ſhe was repreſentative of her ſon *William*, who died before her will; and it would be abſurd, that powers of this kind ſhould be executed for benefit of a perſon dead at the time of executing. But it is contended, that there is a great difference between powers; and that this ſhall have effect in this manner, becauſe it is a naked power, theſe ſums being never part of her property, who was only an inſtrument: ſo that whatever execution, it would have this effect, though contrary to the nature of that paper itſelf: that the quality and nature of the will ſhould be out of the caſe, and conſidered barely as an inſtrument in writing: though it is allowed, that where a power is coupled with an intereſt, the party ſhould be conſidered as diſpoſing of the intereſt, and it ſhould have another effect. This is the firſt time, I have heard, that the execution of naked powers ſhould be conſtrued more favourably than that of powers coupled with an intereſt. The rule of law is otherwiſe; becauſe the party there in ſome meaſure parts with his own property, as a kind of dominion he has over the eſtate, thoſe powers being conſtrued liberally; but naked powers always ſtrictly. It is farther aſked, where is the difference? That it being admitted, ſhe might have done this by deed or inſtrument in writing, not calling it a will, and might have annexed a power of revocation ſo as to enable her to revoke that, and to execute the power over again, this amounts to the ſame: but that is not *ad idem*. If ſhe had executed this power by deed or inſtrument in writing, though with a new power to herſelf, the conſequence would be, the inſtrument was compleat in itſelf; the thing would have veſted from the time of the execution of that inſtrument; and the power of revocation would have no effect but to leave it mutable during her life. But

Naked powers conſtrued ſtrictly.

powers coupled with intereſt liberally.

there

there is a vaſt difference between a deed or inſtrument with power of revocation and a will. The firſt is a compleat act: a will not ſo, death being neceſſary to the completion, as well as to make the things paſs: and really, if in queſtions of this kind ſuch execution of powers by will were to have this conſtruction, and to make any thing veſt in the teſtator's life, ſo that a perſon dead at the conſummation of the will might take thereby; in nineteen caſes out of twenty it would be contrary to the authority of the power, and intent of the perſon executing; (this I mean in general, not as to the preſent caſe) for conſider, what a perſon does, when making a will: Lady *Sunderland* muſt know, that ſhe ran no hazard, becauſe the inſtrument was revocable till her death; but if a court of juſtice ſhould contrary to the nature of the inſtrument hold, that, though the party dies in the life of the perſon executing the power, it will veſt in the executor or adminiſtrator, that may be in a mere ſtranger both to the author of the power and the perſon executing. That would be the conſequence; like the caſes of wills obtained from young perſons by ſurpriſe; as from a young lady at a boarding-ſchool (an inſtance of which I remember in this court) the maſter getting her, ſhe being above ſeventeen, to make a will and him executor: ſo if this would be good notwithſtanding the dying in life of teſtator, it would make it go to a ſtranger. But it is ſaid, this has been determined, that ſuch an execution of a power by will may be good to make it tranſmiſſible to the repreſentatives of the perſon dying in life of teſtator; for which is cited *Burnet* v. *Holgrave*; and if it had not been for that, I ſhould not have ſpent ſo much time about this. But if that caſe is conſidered, it is no authority againſt the opinion now given, or that, I gave, in *Oke* v. *Heath*; for there the perſon executing the power was not limited in reſpect of the objects. It was a general power, to ſuch as ſhe ſhould appoint. She appointed to her ſecond huſband, who died in her life, and made her executrix, ſo that it was really come back to herſelf, and her repreſentative claimed it under the execution of the power. That was a caſe to tempt a court of juſtice to go as far as poſſible to make it good; becauſe it was come back to the perſon, and the ſame thing as if given to her own benefit; and the court only ſupported that in her, which was really originally given for her benefit. It was no doubt in her power to appoint her executors originally, if ſhe pleaſed; becauſe ſhe might do it to any perſon whatever; and there the court might conſider that word *executors* ſo as not to take by repreſentation, but as a deſcription of the perſon to take; and there is ſomething in the caſe, which favours that. It is imperfectly reported in *Eq. Ab.* Executors may certainly be made uſe of either in a deed or will as diſtinct and ſeparate perſons from teſtator; which is the caſe of a ſpecial occupant, 2 *Roll. Ab.* 151. where the executor ſhall be ſpecial occupant; which ſhews, executors may take by that name as diſtinct perſons, and not in repreſentation of the teſtator.

The court cannot be ſure, on what Lord *Harcourt* went in that caſe: yet there was room for that from the words: and all ways were to be taken there to ſupport it, as it was to be conſidered, as if originally given for her benefit. But whether that be ſo or not, it is a ſingle authority; and was a cauſe heard by conſent; which certainly weakens its authority; as it proves it in general not to be ſo fully conſidered; and commonly there is a diſpoſition in the parties to give way to what the court thinks equitable: nor is there that oppoſition as in other caſes. Therefore on the whole upon this firſt point I am of opinion, nothing veſted by this inſtrument in *John Spencer* or Lady *Morpeth* during their lives, and conſequently nothing is tranſmiſſible to their repreſentatives: and to make it do ſo would be contrary to the principle of law, that the perſon muſt in being at the time the thing is to veſt.

Which brings it to the next queſtion, whether theſe ſums will fall into the reſidue of teſtator's perſonal eſtate, or accrue to his children? And, whether it ſhall accrue to all his children and their repreſentatives, depends on the queſtion at firſt conſidered, the conſtruction of the clauſe in the codicil, *viz.* whether any thing is given to the children of the teſtator *eo nomine*, otherwiſe than by deſcription of ſuch as ſhe ſhould appoint to, and conſequently nothing to veſt in them abſtracted from her appointment. It would be very difficult to determine, in what way they ſhould take, or how it would veſt, if that was to be the caſe. The proportions as well as the gift were to be ſettled by Lady *Sunderland*, who has given in her life ſeveral parts to ſeveral of them. What ſhares were to veſt? Were they to take as join-tenants? that is denied by the repreſentatives of the deceaſed children; becauſe that would exclude them, and make it to the ſurvivors. If to take as tenants in common, what are the ſhares? The ſettlement of the proportions and ſhares was to be by Lady *Sunderland*. None can take as tenants in common of uncertain, though they may of unequal, ſhares: and if there was any thing in this ſo as to make them take as children of the teſtator, I ſhould incline, that they ſhould take as join-tenants, and conſequently it ſhould ſurvive. No words of diviſion or diſtribution are made uſe of by the teſtator but by way of reference to the diviſion and diſtribution to be made by Lady *Sunderland*: ſo that it is part of her power only, and not diſtinct from her power, that imports a diviſion between them as tenants in common. And how could it be? If all were to take this remaining 17,000*l.* equally in proportion among them as tenants in common, there would be an unequal proportion thereby among them; for Lord *Robert*'s ſhare, having 6000*l.* given him, would be made more; which would be contrary to the conſtruction attempted on this. But I found myſelf on this; that this is no gift to the children; and conſequently the children cannot take as ſuch. The next queſtion then is, if the

Tenants in common may be of unequal, but not of uncertain ſhares.

reſiduary legatee can take it; for then the plaintiff, repreſentative of his brother, ſtands in his place, and will be intitled? The objection to this is, that the exception takes out of the reſiduary bequeſt this whole 30,000*l.* being indorſed in his hand; therefore contended, that it muſt be conſidered, if not well appointed, as ſomething undiſpoſed of by the will of teſtator, and conſequently muſt be diſtributed. But it has not been mentioned, how it ſhould be diſtributed; for if ſo, the mother muſt come in for one third part of that diſtribution: whereas the counſel for her executrix have not inſiſted thereon: nor can it be contended, that the intent was to leave it in her power to make no appointment, and ſo be intitled to one third; which would be the conſequence, if this was the conſtruction. Not that I ſuppoſe, the teſtator had any diſtruſt in her: and ſhe has acted very honourably, giving away part in her life: but the putting this caſe ſhews, no preſumption can be of that kind. But if the will is ſo, it muſt have its effect. Here is a clear intent in this will to make a diſpoſition of his whole perſonal eſtate; and it is pretty ſtrange, if that ſhould be the conſtruction, that, where one has made a reſiduary legatee of all the reſt, he ſhould die inteſtate as to part. There may be poſſibly ſuch a caſe: and for this was cited 3 *Will.* 40. But this differs widely from that; which was a reſervation of particular ſpecifick things, as goods, *&c.* conſequently the things themſelves were abſolutely taken out of the reſiduary bequeſt; and the court thought, there was no ground to inſert them in it. That is not the caſe here: the teſtator has given this legacy by his will. Suppoſing Lady *Sunderland* had died in life of teſtator, that 30,000*l.* would have gone into the reſidue as lapſed notwithſtanding this exception. No legacy at all is given by the codicil; he has reſtrained his wife's legacy, which was abſolute, to a gift for life only; but no legacy. Suppoſe it was to be conſidered as a legacy, what does it import? Not the thing, but the intereſt given in the thing. That intereſt he has given to his wife for life, and afterward to ſuch as ſhe ſhould appoint, according to ſuch eſtate and intereſt as ſhe ſhould appoint. Suppoſe, it was a reſiduary deviſe of real eſtate, and except thereout ſuch deviſe as ſhall by codicil, *&c.* and he ſhould by codicil make a deviſe for life: the intereſt is only taken out of the reſiduary deviſe: there the word *legacy* anſwers to the word *deviſe*. Beſide this is ſaying no more, than the law implies: it is doing nothing by this exception. If a man gives all his perſonal eſtate, it leaves it open to the codicil; which, if made, ſhall ſuperſede; this exception therefore *nil operatur*. It is like *Hele* v. *Bond*: there was a power, which might be revoked *toties quoties*; and therefore it was ſaid, there might be a ſecond revocation thereby: but the court held otherwiſe; that it was only ſaying by a circumlocution of words, what the law would conſtrue the effect: ſo here, it is only taking out of his reſiduary deviſe ſuch an intereſt, as he ſhould give by his codicil; which the law would have done for him.

Suppoſe by the codicil he had given the 30,000*l.* to Lady *Sunderland* for life, without ſaying any thing of the power: the reſiduary intereſt therein would undoubtedly have gone to Lord *Robert* after her death, and eſpecially when it comes in by way of lapſe. An executor or reſiduary legatee ſtands in the ſame light as an heir, ſo as to take ſomething falling in without the intent of teſtator, as by operation of law. But the negative words are inſiſted on, that this 30,000*l.* is given to no other uſe or purpoſe whatever. I cannot conſtrue theſe words in that manner: but that they are limitations or reſtrictions on the power of Lady *Sunderland*: and, if taken in the large ſenſe, it would make it caduceary; which none can do with his property, ſo as to make it go to none whatever. No one can ſay, his lands ſhall not go to his heir; who ſhall have them notwithſtanding. So of perſonal eſtate, one cannot ſay, his executor nor his next of kin ſhall not have it; for he ſhall notwithſtanding by the law. So that this is by a reaſonable conſtruction to reſtrain Lady *Sunderland*, that ſhe ſhould not have power to appoint but to his own children.

Conſequently theſe lapſed legacies will fall under the reſiduary bequeſt to the plaintiff as repreſentative of his brother: and there muſt be a decree for payment, and account of intereſt from the death of Lady *Sunderland*.

The next morning his *Lordſhip* ſaid, he had forgot to take notice of the caſes cited for defendants; but that one anſwer to them all was, that they were all caſes, where the bequeſt amounted to a legacy to all the children: as where it was "to be divided among "all my children" it amounted thereto, being ſtill legatory words, whether it was by the word *give* or *deſire*; and the perſon would be obliged by the court to give ſomething to every one of the children; conſequently only the proportions were intruſted to the appointor; the objects were fixed.

Horſely *verſus* Chaloner, *Dec.* 4, 1750. Caſe 30.

At the *Rolls*. Sir *John Strange* Maſter of the *Rolls*.

WILLIAM Horſely by will 23*d September* 1727. gives 200*l.* to the younger child of his ſon *William*, or if more than one, then to ſuch younger children, equally to be divided, and to be paid at their reſpective ages of twenty-one; and if any dies before twenty-one, then to ſurvive to the others; and for want of ſuch younger child or children, or their not attaining twenty-one, then the 200*l.* to go to the eldeſt child of his ſon *William* to be paid at twenty-one.

Deviſe to younger children of his ſon to be paid at twenty-one veſted in thoſe born at death of teſtator.

The

The plaintiff *Anne* and defendant *Ellen*, daughters of *William* the ſon, were both born in life of their grandfather, and both come of age: and the queſtion was, whether it ſhould be divided between them, or whether *Mary*, who was born after teſtator's death, ſhould be let in for a third equally with them.

Ante. For which was cited *Graves* v. *Boyle*, 27 *July* 1739. where an after-born child was let in; and *Madiſon* v. *Andrew*, 27 *Nov.* 1747. and if the teſtator had been aſked, if he did not mean, that any child of *William* born at any time ſhould have a ſhare, he would have anſwered *yes*, as in *Plo.* on the conſtruction of an act of parliament.

Ante. Againſt this *Coleman* v. *Seymour*, 24 *Feb.* 1748; where 3000*l.* deviſed to younger children of his daughter; the elder ſon dying after the teſtator, the other became elder, yet was held intitled; the right veſting at death of teſtator in thoſe children then in being, and could not be deveſted.

Maſter of the Rolls.

There are no words in the will denoting a deſign to take in any after-born children: whereas it is common in wills of this nature to to ſay " to the children of his ſon born or to be born". That method in *Plo.* is a proper way of trying it; and poſſibly, if the teſtator had been aſked the queſtion in the manner inſiſted upon, he might have anſwered ſo: but put the queſtion the other way, that the teſtator had been told, he had expreſſly fixed a time, when it was to be paid, and had been aſked, did he mean, that notwithſtanding by any conſtruction on his will the children might ſtay till forty or fifty years old, he certainly would have ſaid, he did not: yet that would be the conſequence: for till the death of *William* it could not be ſeen, who would be intitled, and when any attained twenty-one, they could not demand any thing, which would defeat the end, that they ſhould be accommodated with this when moſt beneficial to them, at twenty-one. The law ſees no impoſſibility of having children at any number of years; and the not keeping demands of this ſort open has very properly induced the court to confine this to ſuch children, as were in being at death of teſtator, when the number is known, and the proportions they are intitled to, and the time when to receive it. In that light every word of the will will have its true and proper effect: it will veſt in them payable at a future time; which time cannot be defeated. By the other conſtruction none of theſe children, in whom it veſted, can know, what they are intitled to. *Coleman* v. *Seymour* is a ſtrong caſe for this; and the more material as the lateſt. It goes farther; as ſtated, there was no direction, when it was to be paid: it ſhews, the intereſt was conſi-

dered

dered as diviſible between the younger children at death of teſtator, tho' afterward one came not within that deſcription. In *Graves* v. *Boyle* no time was mentioned, when the legacy became payable; here it is peremptorily and repeatedly mentioned: and there the daughter had time during life. In *Madiſon* v. *Andrew* it was not to go over, till all the children ſhould die, which makes it different. Principally therefore to avoid the inconvenience from keeping children out of this proviſion expreſſly appointed to be paid at twenty-one, it is conſtrued veſted in thoſe living at death of teſtator, and cannot go farther.

Another queſtion was, whether there ſhould be a perſonal decree on defendant *Chaloner* as executor for payment of this 200*l.* or it ſhould be ſent to the Maſter on an inquiry into the aſſets?

Maſter of the Rolls.

Conſidering the great length of time ſince teſtator's death, it might be very difficult now to make a ſtrict proof of aſſets; therefore the court would do very right to lay hold of any reaſonable opportunity: yet if there were no circumſtances to make him liable, ſuch account muſt be taken. But conſidering the acknowledgments by him, ſuch as an indorſement by him of a receipt of aſſets, (which would be ſufficient at this diſtance of time and difficulty of travelling through an account of aſſets, and no complaint of impoſition upon him) next an expreſs declaration by him, put out becauſe not payable immediately, and that it was ready at twenty-one; ſhall I after all this ſend it to an account, whether he has done himſelf an injury by an account ſtated under his own hand, produced by him, and a deliberate act. It is true, on circumſtances the court will not pin down an executor to an admiſſion of aſſets, as if the money is in bankers hands; the beſt bank in *England* may fail, and that undoubtedly will not bind him. But he muſt make a caſe for it, if he will get over ſo ſtrong an admiſſion; he muſt prove that miſtake, that the circumſtance on which he built his admiſſion failed. The bare payment of intereſt by executor will, in many caſes, be evidence againſt him of admiſſion of aſſets; that however is only charging him by way of argument, that he had the money, becauſe he paid intereſt; here is expreſs acknowledgment. There muſt be a perſonal decree againſt him; and as it has been out at intereſt, which was never applied for their benefit, he muſt account for intereſt from their reſpective times of coming of age; and a circumſtance of miſbehaviour, his obtaining a releaſe without any conſideration, will warrant the court to decree him to pay coſts.

On admiſſion of aſſets, perſonal decree againſt executor with intereſt and coſts.

Where executor is not bound by admiſſion of aſſets.

Caſe 31. Eyre *verſus* Eyre, *Dec.* 4, 1750.

A Negotiation was entered into between the plaintiffs and *Robert Eyre* for the loan of money to him, but he died in the *Eaſt-Indies*. The plaintiffs, not knowing of his death, advanced the money afterward, and paid it to his agent *Lock*, who remitted it in bullion to the *Eaſt-Indies*. It was received there by his executors, who remitted it back to *England*, to the executor of his father *Chriſtopher Eyre*.

This bill was againſt the executor and reſiduary legatee of *Chriſtopher*, to demand this as a debt from him only, and not againſt the eſtate of *Robert*, who, not being alive at the time, could not be made a debtor for it by an act *ex poſt facto*; but the perſon, into whoſe hands it came finally, was accountable for it, and could only be debtor to plaintiffs.

For defendant: This demand ſhould only be againſt the aſſets of *Robert*, on whoſe credit it was advanced. If the agent of *Robert*, in whoſe hands it was, had failed, *Robert* or his eſtate muſt have born the loſs: it was a perſonal contract, entered into in life of *Robert*, which, from its nature, was executory, as it would take conſiderable time before it could be carried into exeution; and if otherwiſe, it would hurt commerce with that country. If loſt in its paſſage, it would not have been at the riſk of plaintiffs, but of *Robert*, inſured in his name, and conſigned over to him.

Lord Chancellor.

There was no agreement by plaintiffs to make this a loan during life of *Robert*, nothing importing a contract. His death was a revocation of the authority of *Lock*, in reſpect of the contract; becauſe there cannot be a loan to one after his death; therefore it will not have the effect of notice to make *Lock* a wrong doer. Then *Lock* could only receive it to uſe of plaintiffs. Suppoſing the plaintiff can make *Lock*, or the executors of *Robert* in *India*, (for I would go as far as I can to aſſiſt them) debtors for this by their affirmance of *Lock*'s act, ſo as to make it had and received by them, by their agent *Lock* to uſe of plaintiffs; how can plaintiffs make *Chriſtopher* a debtor for this? It is a mere queſtion at law; and if you think you have a foundation for it, you muſt try it.

Gower

Gower *verſus* Mainwaring. *Dec.* 5, 1750. Caſe 32.

JOHN MAINWARING executed a deed in truſt, by which the truſtees were to give the reſidue of his real and perſonal eſtate among his friends and relations, where they ſhould ſee moſt neceſſity, and as they ſhould think moſt equitable and juſt. He was then eighty-four years old, declining in health, and had living two ſons, two daughters, and a wife. One ſon died in his life: *Catherine*, one of the daugters, with her then huſband *Carrington* carried him away from the reſt of the family to another place, and prevailed on him to make a will, giving the whole ſurplus of his real and perſonal eſtate to *Carrington*. Poſt 17 Dec.

Two of the truſtees being dead, and the third refuſing to act, this bill was brought by *Catherine*, executrix of her huſband, among other things to have the benefit of this will of her father. Her brother *Gilbert* brought a croſs bill to have the truſts of the deed carried into execution, and to ſet aſide the will.

For plaintiff: This deed intended to put a diſcretionary power in the truſtees; the objects are very general, not confining it to children. Had it been to relations only, the court has indeed, in many inſtances, reſtrained it to the rule under the ſtatute of diſtribution: but it is not ſo. It is doubtful what is meant by the expreſſion of friends. Then the truſtees not acting, this muſt be conſidered as unappointed, and can be only a reſulting truſt or power to donor himſelf, which he might diſpoſe of by will, and which he has done. If a feoffment to uſes, the power would reſult, if no appointment. Sir *Edward Clere*'s caſe. So if to ſuch truſts as he ſhould appoint, and no appointment. The queſtion is, whether the court can ſubſtitute itſelf in the place of truſtees having power to act diſcretionarily? In *Brereton* v. *Brereton*, 13 *July* 1738. a marriage ſettlement, proviſo if the huſband, his heirs, executors, or adminiſtrators, with approbation and good liking of two truſtees, ſhould ſettle lands of 80*l. per ann.* to the ſame uſes, then that ſettlement to be void: the elder ſon and heir applied to the truſtees to conſent, that on ſettlement of an eſtate of equal value the former ſhould be void; the truſtees would not conſent; without which it could not be good in point of law: a bill was brought to compel their conſent. Your Lordſhip held that it could not be done, and that a bill of that kind againſt truſtees, who had a diſcretionary power to conſent or not, was never admitted. A court of juſtice cannot look with the eyes of the truſtees. In Dr. *Potter* v. Dr. *Chapman* a power to preſent to a living was diſcretionary; your Lordſhip held, it devolved not on the court; that it was veſted by a perſon who could veſt it in one of the objects within the power; and

and would not controul it, though it ſeemed indiſcreetly exerciſed. Donor might have exerciſed it himſelf again, if truſtees had refuſed to accept; and it is the ſame now they refuſe to act. He has deviſed it, under which plaintiff is intitled, and from the bounty of a parent.

For defendant: This deed was a fair and prudent act to prevent any temptation in making a will and any jealouſies. The ſcheme was propoſed and approved by plaintiff and her huſband, and in his hand-writing, and tallies with the deed; yet he afterward carries him away, and gets him to diſinherit his heir, and give the whole to the huſband of his daughter, who had 1200*l.* portion. Death of truſtees would not totally deſtroy the truſt. The third truſtee chuſes to decline from age and infirmity, and no otherwiſe refuſes. It is veſted in them in point of law; but on a truſt and confidence which is imperative; not a power which may or may not be exerciſed. They ought to execute; and this court will oblige them, being only inſtruments. It is required that the heirs or executors of ſurvivor ſhould do it; ſo that it is not a perſonal diſcretion, but the common caſe of all imperative truſts, and to continue. It is ſaid, the word *friends* raiſes a doubt; but in *Cheſhire*, where this was done, it is ſynonymous with *relations*; and ſo all over the *North* of *England:* and it is the language of *St. E.* 1. that adminiſtration ſhould be to the next friend. It muſt mean relations here, thoſe who have a claim from equity and juſtice, his family. The meaning certainly was to divide it among children and grandchildren. Caſes have been determined ſtronger than this, whereupon truſtees not acting it devolves on the court. On a will to diſtribute a reſidue to poor diſſenting miniſters, their wives and widows, the court directed it to be done, and ordered the objects before the Maſter, which is ſtronger than where the truſtees do not act. Though the court does not care to take truſts on itſelf, it muſt from neceſſity; as in Sir *Coniers Darcy* v. Lord *Holderneſs*; where, on a deviſe of guardianſhip to two, who diſagreed, the court appointed a guardian.

LORD CHANCELLOR.

I will take time to conſider of the queſtion, which is very particular on this truſt. It appears, that this deed of truſt was entered into on a contract and agreement, in the family of this man, that a proper diviſion ſhould be made of his effects on an apprehenſion of ſurpriſe upon him from his age and weakneſs; and it ſeems extraordinary, that after that deed was executed a will ſhould be obtained by one of the very perſons party to the procuring that deed; he himſelf preparing the ſcheme of it, and afterward taking a will from him made on a ſuppoſition of caſes, ſuch as I never ſaw in my life. No caſe has been cited in point; nor do I know any. If I can find a foundation from the authorities of the court, or from the reaſons

and grounds thereof, to favour the reſt of the family, I ſhall certainly incline to do it, as far as juſtice will permit; if not, it muſt take its chance. What differs it from the caſes mentioned, is this, that here is a rule laid down for the truſt. Wherever there is a truſt or power (for this is a mixture of both) whether ariſing on a legal eſtate, or reſerved to be exerciſed by truſtees, barely according to their diſcretion, I do not know the court can put themſelves in place of thoſe truſtees to exerciſe that diſcretion. Where truſtees have power to diſtribute generally according to their diſcretion without any object pointed out, or rule laid down, the court interpoſes not, unleſs in caſe of a charity, which is different, the court exerciſing a diſcretion as having the general government and regulation of charity. But here is a rule laid down; and the word *friends* is ſynonymous to *relations*; otherwiſe it is abſurd. The truſtees are to judge on the neceſſity and occaſions of the family; the court can judge of ſuch neceſſity of the family. That is a judgment to be made on facts exiſting; ſo that the court can make the judgment as well as the truſtees; and when informed by evidence of the neceſſity, can judge what is equitable and juſt on this neceſſity. I give no opinion now; but there is a great difference between this and a general truſt referring abſolutely to diſcretion of the truſtees. I will therefore conſider of it, and look into the authorities on that head, unleſs the parties agree.

Truſtees having a diſcretion, it ſeems, on their not acting, the court cannot in their place, unleſs for a charity.

Otherwiſe where a rule laid down for the truſt.

Aſkew *verſus* The Poulterers Company, *December* 6, 1750. Caſe 33.

A Queſtion was made, whether a decree in a former cauſe, wherein the preſent plaintiff and defendants were parties, might be read on the part of the plaintiff; it being objected to, becauſe no opportunity of croſs-examination between co-defendants?

LORD CHANCELLOR.

I am very clear that it may be read as evidence, though not as concluſive evidence. It frequently happens that there are ſeveral defendants, all claiming againſt the plaintiff, and having alſo different rights and claims among one another; the court then makes a decree ſettling the rights of all the parties; but a declaration for that purpoſe could not be made if this objection holds; which would be very fatal, as it would occaſion the ſplitting one cauſe into ſeveral.

Decree, wherein preſent plaintiff and defendants were parties, read as evidence, though not concluſive.

Another queſtion was, whether the examination of witneſſes in that cauſe could be read againſt the defendants now?

LORD CHANCELLOR.

So of depoſitions in that cauſe where the bill and decree was for performance of truſts, ſettling the rights of all.

I agree the general rule to be, that, where there are ſeveral defendants at hearing, depoſitions taken on part of one defendant may be read againſt the plaintiff, but not againſt a co-defendant; becauſe there cannot be a croſs examination: but it often happens, that in a bill for performance and execution of truſts in a will or deed, ſeveral parties are before the court, and a decree is made for performance of the truſts, and a declaration of the court on the ſeveral parts of that truſt how far it ſhall extend; which decree is acquieſced in: it is conſidered as a determination among all the parties, as well between the co-defendants as the reſt; otherwiſe the decree would become uſeleſs; and it would be neceſſary to have as many bills, as there are parties claiming different rights, was this doctrine to prevail. A determination by the court for performance of truſts has been held a ground for a bill for perpetual injunction againſt the party ſetting up a legal eſtate to over-turn that decree; which was the caſe of *Acherly* v. *Vernon*; and alſo in a caſe relating to the Duke of *Buckingham*'s eſtate, where there was a decree for performance of a truſt, and a declaration who was intitled to one part, and who to another. So has there been a decree of that kind in this caſe, which is evidence between all the parties; and this depoſition may be read to ſhew what was the foundation of this decree: and otherwiſe it would be impoſſible to have any fruit from a decree for the general eſtabliſhment of truſts under a will, where there are ſeveral parties. Whether concluſive is another matter.

Perpetual injunction on decree for performance of truſts.

The bill was for an account of rents and profits, and to have poſſeſſion of an eſtate on the deſtruction and loſs of a deed; the plaintiff deriving a right from a conveyance by an heir at law on determination of the uſes in a ſettlement.

LORD CHANCELLOR.

On loſs of a deed ſame rule of evidence here as at law.

The loſs only can be made out by circumſtances; deſtruction of deed by affidavit.

If there is proof of deſtruction by defendants, it would be a ground for immediate relief; but it is founded on the loſs: and the rule of evidence is the ſame here as at law. It is a queſtion of a legal title; plaintiff muſt ſhew title in himſelf as well as none in defendants, and muſt recover by his own ſtrength, though they are wrong doers. He has not proved a title in himſelf, nor does he prove what were the contents or uſes in that ſettlement. Plaintiff reſorts to other proof; to let in which he muſt ſhew it is the beſt the nature of the thing will admit; and muſt prove that it is loſt or deſtroyed. Though deſtruction of a deed may be proved by affidavit, the loſs of one cannot commonly be ſo, but only can be made out by circumſtances;

as that inquiry has been made, and ſearch in the proper place and hands, and in vain. As defendants therefore inſiſt on it, it muſt be tried at law.

Caſe 34.

The Biſhop of Cloyne *verſus* Young, *Dec.* 7, 1750.

G. *Berkeley* made his will *Nov.* 19, 1746, thereby, after making *Young* and *William Broom* his whole and ſole executors, as to his perſonal eſtate it pleaſed God to bleſs him with, he diſpoſes of it as follows. Among ſeveral other legacies, he gives to his worthy friend, *William Broom* a mortgage, he had on the eſtate of *William Broom* himſelf, with all the intereſt due thereon, to be divided equally between the daughters and a niece of *William Broom*, on their marriage, provided with his conſent, or at his death; and on their deaths to be divided between the two ſons of *William Broom*. To *Young* he gives a bond of 200*l.* which was owing to the teſtator by the other executor *Broom*. Then comes this clauſe, "*Item*, after "all my juſt debts and legacies paid, I give and bequeath the re- "mainder of my eſtate real and perſonal, and whatever ſhall be "due to me for half pay, &c. without ſaying more."

The bill was brought by the next of kin of teſtator, againſt *Young*, the ſurviving executor, and againſt the repreſentative of *Broom*.

For plaintiffs. The only queſtion is, whether the executors are truſtees of the reſidue, or intended to have the intereſt of it? Two principles are to be eſtabliſhed. 1ſt, That if ever the legal eſtate is granted, conveyed, or deviſed to another on truſt, he can take no more of the beneficial intereſt than he is intitled to under the declaration of truſt; for though the legal deviſe is an abſolute fee, yet if there is an intimation of a truſt, nothing beneficially can be taken by the legal deviſe; the whole, as to land, reſulting to heir at law, as to perſonal eſtate, to next of kin. Which appears in *Loder* v. *Loder*, where was a deviſe of the manor and rectory of *H.* to his ſon *Charles* for ninety-nine years, if he ſo long lived; remainder to truſtees to preſerve, *&c.* remainder to firſt, *&c.* ſon, in tail male; remainder to his ſon *F.* for life, with like remainders in ſtrict manner; and for want of ſuch iſſue, to his kinſman *Robert Loder*, and his heirs for ever, on truſt, that *Robert*, his heirs and aſſigns, ſhould pay to all the daughters of his ſons, as an additional portion, 5000*l.* equally, or the whole 5000*l.* if but one, to that one; and to *Charles* and his heirs all his other eſtates in truſt for debts and legacies, the ſurplus to his own uſe; making him ſole executor: There was a failure of iſſue: the will was proved: and *Robert* ſo ſeiſed of the manor liable to the 5000*l.* which was a ſtrong caſe for *Robert*'s being intended to take this manor beneficially; being deſcribed of his kin, name, and family; and plain he did not intend it ſhould go to the iſſue female

of

of his ſons. The queſtion was, whether *Robert* was intitled to the beneficial intereſt ſubject to the 5000*l.* or whether it paſſed to *Charles* by the reſiduary deviſe? It came on two bills: 1ſt, by *Robert* himſelf againſt the heirs at law of *Charles*, to have the deeds and writings of this eſtate that were in their poſſeſſion. It was held at the *Rolls* in 1730. that the deviſe to *Robert*, being expreſſed to be on truſt, though a particular truſt, and which would not exhauſt near the value of the eſtate, yet he could take nothing in the reſt, therefore the bill was diſmiſſed. On this the heirs brought a bill againſt *Robert*, praying account of the rents and profits, and to be let into poſſeſſion as a reſulting truſt: it was heard *June* 5, 1732. parol evidence was offered of the teſtator's declarations, that he intended it beneficially for his couſin *Robert:* the court held, it could not be read; and that being given on a particular truſt, it was ſufficient to take away the advantage by the legal deviſe; if therefore the teſtator had not given the reſidue, it would have gone to the heirs by the reſulting truſt: but there was a ſweeping clauſe carrying it as undiſpoſed of. Other caſes were alluded to there, that wherever an eſtate is given on truſt, and there is a chaſm in the declaration of truſt, the owners of the legal eſtate ſhould not have it at all, but the expreſſion of the particular truſt ſhould take it from them; as in a gift of an eſtate to be ſold for payment of debts, or to raiſe money, *&c.* and nothing more is ſaid as to the beneficial intereſt. The next propoſition is that which comes more immediately to the preſent, *viz.* wherever it probably appears, (becauſe in no caſe it neceſſarily appears) that teſtator intended only to give his executors the office, and the legal intereſt ariſing from thence, but did not know that would carry the beneficial intereſt in the reſidue, or did not intend it, if he might know it; the executors can take nothing in the reſidue but under an expreſs declaration of truſt. It is true, an executor was an heir by the old *Roman* law: now an executor is truſtee to all particular uſes in the will, as for creditors and legatees. But though the law remains ſtill, that would give him the beneficial intereſt, as well as the office; yet wherever it appears, the teſtator did not know it would go to him, or did not intend it, the court conſiders him as truſtee, and he can take nothing but what ariſes on that truſt; on which all the caſes ſince *Foſter* v. *Mount* have been determined; and that on a probable collection by the court, not a neceſſary inference; for there is no inconſiſtency or abſurdity in the thing itſelf, in ſaying, I give a particular legacy to my executor, and give him all the reſidue. Courts of equity have been very favourable to ſhew that executors were truſtees; and therefore a little matter has been ſufficient to ſhew that intent. One head of caſes ſettled is, that wherever an intent is ſhewn at the time of making the will, that the office was not to carry the reſidue to the executor, but meant a truſtee for that, he ſhall not take it afterward by any accident; and yet that is not a neceſſary conſequence; as where reſidue deviſed is to perſons named,

who by dying in teſtator's life are incapable of taking; it proves teſtator did not mean executors ſhould take it. Thus in *Page* v. *Page*, *Mich.* 2 *G.* 2. where the whole reſidue was deviſed to the wife for life, and after her death to ſix by name equally to be divided; one of theſe tenants in common died in teſtator's life; and Lord *King* held, that this one-ſixth lapſed ſhould be divided among the next of kin, not to the executrix; for having in terms given it away, he did not intend any part ſhould go by virtue of executorſhip. So in *Painter* v. *Saliſbury*, *May* 11, 1734. at the *Rolls*; where reſidue deviſed to wife and ſon equally, and wife made executrix, the ſon dying in teſtator's life, that lapſed moiety went to the next of kin, not the executrix. Caſes nearer to the point are, where the reſiduary eſtate takes not effect originally in its own nature, as *Wheeler* v. *Sheers*, *Feb.* 23, 1729. where reſidue deviſed to executors, but in truſt, after deducting 100*l.* a-piece to themſelves, to apply to ſuch charitable uſes as teſtator ſhould by codicil direct: he made three codicils, without taking any notice of a charitable uſe, and died without otherwiſe diſpoſing of the reſidue: Lord *King* held the executors only truſtees for the next of kin. There that intended diſpoſition, though never made effectual, ſhewed they were not to take as executors. So in 3 *Wil.* 40, upon an intent to diſpoſe, which intent was not carried into execution. And here the words cannot take effect merely from the miſtake of teſtator in not naming the deviſee, but it proves they could not take as executors. So in *Nevil* v. *Parker*, *April* 1726. on the will of ——— *Gardner*, who deſired *A.* and *B.* ſhould be his executors, and gave to his ſiſter 400*l.* to the executors 10*l.* each, and other legacies, and broke off in this manner, "I leave to *C.*" without ſaying more, ſo that it was not compleat as to the reſidue: Lord *King* held it ſhould be diſtributed among the next of kin. The preſent caſe comes within both the above principles: for 1ſt. teſtator meant to give the office, and conſequently legal eſtate, to his executors *eo nomine* on truſt, in reſpect of the whole that office was to carry. 2dly, He did not intend the nomination of executors ſhould carry the reſidue, but meant to give it by expreſs deviſe; which ſhews they were to be truſtees as to that, and it muſt reſult to thoſe, who, as to this ſort of property, are heirs. The penning is remarkable: the firſt clauſe gives the office and legal intereſt, and is an introduction to the abſolute diſpoſition of the whole perſonal eſtate, as much as if he had ſaid, "on truſt, *&c.*" Then for one executor's trouble he gives a bounty to his family, for whom every parent is bound to provide, and which anſwers the end of a legacy to himſelf; and as the intereſt, until the uſes ariſe, goes to *William Broom*, it ſeems beneficial to himſelf. To the other a ſpecifick legacy, the very debt due from the one executor; which debt is extinguiſhed by the will itſelf, and which he never would have deſired to be kept up for one, if he meant to give the whole to them. Then comes the expreſs reſiduary bequeſt, without naming the legatee, which makes

it like the caſe of a void deviſe, as to one who dies in teſtator's life, or to be laid out in land for a charity; in neither of which caſes can executor take, becauſe of intent to give it. This plainly is not intended for the executors; for then why not fill up the clauſe, when he wrote the firſt part? He was not then ſettled in his mind to whom he would give it; and was probably furniſhed with the form of a will of this ſort, with an *&c.* which he tranſcribed with the *&c.* but ſtill with intent to diſpoſe of his perſonal eſtate; and afterward, on ſome diſorder, ſent for his will, and ſigned it, (which appears in a different hand) thinking he had diſpoſed of the whole.

For defendants. Queſtions of this kind ſeem a perpetual fund for the courts, ſince the rule of law has been deviated from. Lord *King* thought the courts have gone rather too far, and attempted to have it ſettled by the legiſlature; which was impoſſible, theſe caſes depending on circumſtances. Executor is heir *quaſi mobilia*, not only as to the legal but beneficial intereſt, after debts and legacies. So it ſtood originally, as appears from the *Office of Executors*, till the ſtatute of diſtribution; for tho' on inteſtacy the eccleſiaſtical court required a bond from adminiſtrator to diſtribute among next of kin, yet never where a will. Before that ſtatute it never would have been thought of taking the perſonal eſtate out of the executors in court of law or equity, though they ſhould apply it to their own uſe. To give this from the executors there muſt be ſomething of a partial inteſtacy. From 23 *C.* 2. until 1687, there was no caſe on that act. Then came *Foſter* v. *Mount*, which was very particular, but did not go on fraud, but was founded on the very expreſſion creating a truſt, *viz.* for his care and pains. So far courts of equity went very right; for it plainly implied he ſhould have no more. It was afterward extended farther; that a legacy in general to a ſingle executor would exclude; which was on a ſort of reaſoning that ſeems inconcluſive, *viz.* from the abſurdity of giving all and ſome. Few can know in what condition they ſhall die; therefore a legacy to an executor has a good effect, becauſe he ſhall then come on an average with the other legatees, who would otherwiſe have a preference. So that reaſon ſeems not well grounded, and of that opinion your Lordſhip has been: what ſhall be the amount of ſuch a legacy has been diſputed. Mourning has been held both ways; but this goes a ſtep farther; for it is now contended even where no legacy, and endeavoured by circumſtances in the will to make executor truſtee. It is never ſo but where the legacy is an intire bequeſt, without relation to any other object; and the latter caſes have rather weakened the former; for a particular intereſt for life ſhall not exclude from the reſidue: *Jones* v. *Weſcomb*, *Eq. Ab.* 245. and the Ducheſs of *Beaufort*'s caſe. So if by way of exception out of a particular ſpecies of goods: as in *Griffith* v. *Rogers*, and by your Lordſhip in *Blinkhorn* v. *Feaſt* laſt term. Which ſhews the court never takes away the right the law gives, but where the in-

tent is ſtrong on the face of the will, and not on a probable gueſs. A legacy to one executor only will exclude neither; and it muſt be to the party himſelf, and not to his children only, as here inſiſted on. Beſide the niece is joined with them; nay, one of the plaintiffs has a legacy, and never diſtributable, where a legacy to next of kin, and none to executor. The contrary to the rule, collected on the firſt principle for the plaintiffs, is laid down; as in *Batchelor* v. *Serle*, 2 *Ver.* 736, *Eq. Ab.* 246. There muſt be a neceſſary implication or violent preſumption within the rule as to real eſtate, of not diſinheriting an heir at law; as in all thoſe caſes where teſtator has expreſſed a truſt of the reſidue, whether of real, as in *Loder* v. *Loder*; or perſonal, the executor there ſhall not have it for his own benefit. So in the caſe of no appointment, and of lapſe, being a ſtrong implication, the executor was not intended to have it. In *Nevil* v. *Parker* there was a legacy to the executors; the right veſted ſhall not be overturned, becauſe of the part of the will in which the executors are named. It is as difficult to account, if he intended others ſhould take it, that he ſhould not name them, as that he ſhould not name the executors over again: but he muſt be preſumed to know they would be intitled if he named no other. Nor will the court extend a principle, but ſlender at firſt, when it cannot be ſaid with certainty, that he did not intend the executors ſhould take. They were friends to teſtator; there is an expreſſion of regard in the will; and not to be preſumed he intended only a troubleſome office: whereas the plaintiffs were in another kingdom, and ſome of them he never ſaw. There is a negative proof, that it was ſaid by teſtator this family ſhould not have any thing; though parol evidence cannot be read for the plaintiffs, this may be read for defendants to rebut an equity, inſiſted on by plaintiffs in oppoſition to a rule of law; as held in *Littlebury* v. *Buckley*.

LORD CHANCELLOR.

Though plaintiffs could not originally read it, yet may they read it to take off that evidence read by defendants; for it were a ſtrange rule that it might be read to ſhew no reſulting truſt for the next of kin, and that the other ſide might not read to take off the credit thereof; not to prove that teſtator intended to give it to them, but to anſwer the other.

On which it was waved; and *Lord Chancellor* delivered his opinion.

This depends on the conſtruction of the will, which conſiſts of ſeveral parts, and from which ſeveral arguments have been drawn. Many caſes have been before the court on this queſtion; and they generally have ariſen on that point which was in *Foſter* v. *Mount*, and which has been ſince extended farther by other caſes. But the preſent

ſent will not fall under the determination of any of thoſe caſes; none of which, or any caſe that can be cited on that head, can be called caſes in point to this; which is a caſe depending on a more general principle: whether or no there does not appear a clear proof or violent preſumption, ariſing on this will, that teſtator intended to make them only executors in truſt, and by naming executors not to give any beneficial intereſt in his perſonal eſtate; to prove which it has been argued on two principles on the part of plaintiffs. 1ſt, That wherever the legal eſtate is deviſed in truſt, or on a particular truſt, whether of land or perſonal eſtate, being named or deſcribed as a truſtee, he ſhall be conſidered only in that light through the whole, and not for his own benefit, unleſs as to what is expreſly given; for which was cited *Loder* v. *Loder*, a deviſe of real eſtate in truſt for particular purpoſes, which did not exhauſt the whole inheritance or value of the eſtate; where it was held, that he ſhould not take the reſt for his own benefit, but ſhould be a truſtee as to that, though no declaration of truſt. But the preſent caſe does not properly or directly fall under that principle; for thoſe caſes are, where there is ſome truſt declared by the teſtator expreſly; which cannot be ſaid here: therefore the very making executor truſtee in the firſt inſtance, which is the foundation of the plaintiff's claim, ariſes from conſtruction and implication, and not expreſs words; conſequently it cannot be determined on that principle. The other principle was, that wherever it probably appears, that teſtator intended only to give the office of executor or legal intereſt only of the perſonal eſtate, not the beneficial, he ſhall take barely a truſt. I think it is under ſome principle of that kind, the preſent caſe muſt be determined; but I cannot agree that the principle is to be laid down ſo looſe and general as that is; for that would be taking too great a latitude, and making determinations of this kind of property too looſe: and therefore the rule is rather, (which may come to the ſame thing) that where a neceſſary implication or violent preſumption appears, that the teſtator, by naming executor, meant only to give the office of executor, and not the beneficial intereſt or property, he ſhall be conſidered as a truſtee, and a reſulting truſt for next of kin of teſtator. Whether there is ſuch a neceſſary implication or violent preſumption, which is the true ground of that principle, is the queſtion. It has been argued on two conſiderations, ariſing out of the will. 1ſt, That teſtator has given each executor ſome particular legacy or beneficial intereſt to themſelves by expreſs words or clauſes in this will, and therefore to be excluded from the reſidue. Next that, abſtracted from that, an intent is ſhewn by expreſs words to give away the reſidue, though it is imperfect; and that thence ariſes a neceſſary implication, or violent preſumption, that by naming them executors in the firſt part he did not mean to give the ſurplus, that is the beneficial intereſt, becauſe in the latter end he meant to give it expreſly. The latter point is moſt relied on for plaintiffs, and I think if the firſt point

ſtood

ſtood alone, it would not be ſufficient to exclude defendants from the beneficial intereſt. There are ſeveral caſes on this head, and great variety of opinions: but on the latter determinations it ſtands more in favour of the next of kin than of the executors; becauſe of their relation, which makes it more probable that teſtator had an intention of kindneſs toward them; and if in any inſtance it goes contrary to his intent, it is better it ſhould be ſo, than that a general rule ſhould be laid down, which might give room to ſurprize. The firſt caſe was, where a legacy was given to an executor for his care and trouble; which was a very ſtrong caſe for a reſulting truſt; not on the foot of giving all and ſome, but that it was an evidence teſtator meant him as a truſtee for ſome other, for whom the care and trouble ſhould be, as it could not be for himſelf. Afterward it went further; and the giving a legacy without more has been eſtabliſhed to exclude an executor from the reſidue; that is, where the legacy to executor is generally and abſolutely; for under certain limitations it might not exclude him. This is ſaid not to ariſe from neceſſary implication, but from a probable ground, *viz.* that it was giving him ſome part and afterward all; which none can be ſuppoſed to intend. But the foundation of that was weak; becauſe teſtator might intend that particular legacy to him in caſe of the perſonal eſtate's falling ſhort, that he might be ſure of ſomething, and take his particular ſhare with the other legatees in the ſcramble on abatement in proportion. But notwithſtanding this, the court has not conſidered that in general. This queſtion has ariſen where there was a clear ſurplus, and no doubt thereof; ſo that teſtator could have no notion that there would not be ſufficient to pay the legacies, and that therefore it was neceſſary to take care of the executor. None of the caſes have been where the fact warranted ſuch a notion in the mind of teſtator, and therefore it is not neceſſary to enter into the queſtion, whether the judges argued right therein; but they have ſettled it. Afterward there have been limitations upon this; as in the Ducheſs of *Beaufort*'s caſe, where a gift for life, giving a particular intereſt only, was held not to exclude executor from the ſurplus; as it may be ſuppoſed the giving that intereſt was barely for the ſake of letting in the bequeſt over of that part of the eſtate. So a legacy to one of two executors, inſtead of excluding both, excludes neither from the ſurplus; becauſe if he left that between them as executors only, they muſt take it equally, and therefore he might give that legacy as a preference to one of them: it would alſo prevent the ſurvivorſhip; for if one of them died after death of teſtator, and before any diviſion, the other executor would take by ſurvivorſhip; whereas what was given by way of particular legacy would be tranſmiſſible, and not ſurvive. But to conſider how the principles or reaſon of theſe caſes have been applied to the preſent. As to *Broom*, nothing can ariſe to exclude him from the reſidue on any of the caſes mentioned. How far it may be a corroborating argument on the other point is

another matter: but he cannot be excluded as being a legacy to him, for it is not to himſelf; not ſuch from whence a neceſſary implication or violent preſumption may ariſe. No caſe has gone ſo far; nor would it be reaſonable; nor would he be intitled to the intereſt during life; for if ſo, it has been rightly argued that it would be a legacy *pro tanto*. The teſtator has given it with all the intereſt: ſo that even if any intereſt due at death of teſtator, that is given to the two daughters and niece, though to be divided afterward between them; which is a plain evidence of not being given to him in mean time, but muſt be laid up for their benefit. As to the other executor, indeed, there is a ſpecifick legacy for his own benefit: there is ſomething odd in that; and that, as a legacy, is not ſufficient to exclude both or either of them; being a legacy to one of the executors only. He intended to give him a preference to the other; and conſequently no neceſſary implication or violent preſumption that he intended to exclude them from the ſurplus; and ſo directly within the caſes above-mentioned: ſo that on this point the legacies given are not ſufficient to exclude them. The great ſtreſs of the caſe reſts on the other point; whether there is not ſufficient out of this imperfect reſiduary clauſe to exclude them. I am of opinion there is, and that it would be much too far to ſay, that on ſuch a will, ſo framed, the executors ſhould have the ſurplus. The date of the will is at a different time, as appears plainly from the hand, and the weakneſs with which it is written, varying from the body of the will. But I know not whether I ſhall lay weight on that; becauſe I muſt be bound by the probate; the original will not being ſo properly before me; and I muſt take it as it appears on the probate. The teſtator plainly intended to diſpoſe of the reſidue by way of reſiduary bequeſt. The *&c.* I believe, meant with regard to the funds; though it was a very unneceſſary *&c.* the whole being included in the former words. And it is not unreaſonable to conſtrue, that the *&c.* was meant to take in any thing that was to follow; any further ſpecification of his perſonal eſtate, and alſo the perſons he intended to give it to: and, if one may conjecture, I believe the conjecture is rightly made on the part of the plaintiffs, that he had tranſcribed the form of a will in this manner, but ſtill with intent to diſpoſe of the perſonal eſtate. The preſumption from that clauſe is truly inferred, that he did not intend, by naming executors to give them the beneficial intereſt of the perſonal eſtate; becauſe he intended, at that time, to give it in another manner; and therefore intended to give them nothing but the office; not that there is any thing in naming them executors in the beginning of his will; which is too much to lay a ſtreſs on. Then if there is ſuch a violent preſumption, it is ſtill founded on the ſame principle, though not within thoſe caſes in point; and for this the caſe comes very near *Page* v. *Page*, where the ground of Lord *King*'s determination, that the one-ſixth part (which could not ſurvive, becauſe they were tenants in common)

ſhould be diſtributed as undiſpoſed, was, that teſtator declared his intent to make a different diſpoſition of the ſurplus of his perſonal eſtate, and that it ſhould not go to his executrix by force of being executrix. That caſe did not depend on her having a particular legacy therein; nor did the court go on that; nor would it be ſufficient; for it was only for life; which, according to the Ducheſs of *Beaufort*'s caſe, was only to let in the ſubſequent bequeſt over, not to exclude from the reſidue; which bequeſt over could not take place as to one-ſixth, and therefore to be diſtributed as undiſpoſed. On the ſame ground was *Pain* v. *Salter* *; where one reſiduary legatee dying in life of teſtator, the other, who was alſo executrix, claimed the whole reſidue: Sir *Joſeph Jekyl* held, that a moiety ſhould be diſtributed, according to the ſtatute, among the next of kin. In that caſe, according to the Ducheſs of *Beaufort*'s, I do not think there was ſufficient ground to ſay, the executrix ſhould be excluded by having a moiety: that was to let in the ſtranger to a ſhare with her, not to exclude her from her right as executrix; and when that ſtranger was out of the caſe, by dying in teſtator's life, it might be ſaid ſhe ſhould take it as executrix; but the court held otherwiſe. Then conſider what reſults from this clauſe: in the firſt part of the will theſe two are named executors; which might be in two lights, either as truſtees, barely and for the management and adminiſtration of his perſonal eſtate, or to take the beneficial intereſt. By the laſt clauſe he has ſhewn an intent by expreſs words to diſpoſe of the reſidue; then he did not mean they ſhould take it by implication, by force of having the office. But it is ſaid, this being an imperfect clauſe, does not operate, and nothing is to be inferred from thence, and therefore teſtator might mean to give it to the executors, or might be in doubt whom to give it to, and, not having cleared up that doubt, the right of the executors is to ariſe: admitting he intended to give it to the executors, it follows, he did not intend they ſhould take it as executors, but by expreſs words; and his being in doubt proves the ſame point ſtill, that it was not his intent at the time of making this will, that they ſhould take this reſidue by force of being executors, but intended a further diſpoſition, which he has not made. Then is not this the ſtrongeſt caſe to ſay, that it was not the intent that by being named executors they ſhould have the beneficial intereſt? In the caſe above cited it might be ſaid, that whatever lapſed, ſhould go to the executrix as ſuch; but the court held, it was evidence that at the making the will he intended ſhe ſhould not take this as executrix, and then nothing can give it afterward, but it ſhould go to next of kin as undiſpoſed. But it is ſaid, executors may take in this caſe as an heir at law ſhall; as if teſtator has ſpecifically deviſed part of real eſtate, and afterward the reſidue, and deviſee dies in life of teſtator, it ſhall deſcend to the heir; but there is no argument from thoſe caſes to the preſent. An heir takes by the law, not by intent of teſtator, but contrary to his intent and will; whereas an executor muſt take by

* Or Painter v. Saliſbury.

by the will; and therefore if at making the will the intent appears, that the executor ſhould not take the beneficial intereſt in the ſurplus, no accident afterward can give it him; whereas an heir has another foundation, from the law. This reſiduary clauſe ſhews an intent to diſpoſe of it in ſome other manner, tho' imperfect, ſo that it cannot go to the executor, as that would be contrary to the intent; and in that reſpect it is ſomething like *Newill* v. *Parker*, where the will was left unfiniſhed, ſaying, "I give to *A. B.*" but did not ſay what he gave; but it came in the place where the reſiduary bequeſt was to be expected. It was ſaid, indeed, there was a legacy. I remember that caſe, and think Lord *King* did lay weight on that argument. But in the preſent caſe the reſidue muſt be accounted for, and divided between the plaintiffs as next of kin. There is ſomething, I think, in the argument drawn from the bequeſt of the bond to *Young*. Certainly it is by no means ſufficient of itſelf to exclude the executors, or either of them, from the ſurplus; but when taken with the other circumſtances, and with the inchoate diſpoſition afterward, it corroborates this opinion; for it is unaccountable, that if a man intended to give the ſurplus of his perſonal eſtate to theſe two executors, he ſhould, when ſo great a ſurplus came to be divided between them, give to one a debt from the other, and not rather leave that debt at home.

Caſe 35. Oates *verſus* Chapman, *Dec.* 8, 1750.

Ante: 6 Aug. 1750. Coſts refunded on reverſing order for allowing a demurrer.

NO authority or precedent being to be found; Lord *Chancellor* now ſaid, he muſt determine according to the nature and reaſon of the thing. His opinion was, the 5*l.* muſt be refunded agreeable to the general rule of law. If a judgment is reverſed on writ of error, the party is always reſtored to whatever he loſt by that judgment; and conſequently if that judgment was executed, and coſts levied, they muſt be reſtored. If a bill is diſmiſſed with coſts; the decree not ſigned or inrolled, but however, proceſs taken out for the coſts (which may be) and levied; the plaintiff applies to rehear, and the former decree is reverſed; thoſe coſts muſt be refunded: the defendant cannot retain them againſt the plaintiff, when the plaintiff has prevailed.

Caſe 36. Biſhop *verſus* Church, *Dec.* 12, 1750.

J. C. Poſt. 371. 25 July 1751.

SELIM OWEN and *James Church* partners, borrowed from *Biſhop* at two different times two ſums of 1000*l.* each; for which they gave two bonds, binding themſelves, their heirs, executors and adminiſtrators, with condition that if they, or either of them, their or either of their heirs, executors, or adminiſtrators, *&c.* *Church* broke off the partnerſhip, and died in 1740. *Biſhop* died in 1747:

and his repreſentatives, *Owen* becoming bankrupt, bring this bill againſt the repreſentatives of *Church* for a ſatisfaction of this debt out of his real and perſonal aſſets.

For plaintiff. This obligation by the intent of the parties on the face of it ſhould be joint and ſeveral, as the condition imports, though through ignorance it is drawn ſo as to make it joint. Though the inſtrument is ſo framed, that remedy may be againſt one only, if living; yet in juſtice and conſcience both were debtors. The real conſideration is paid to both; both are bound, and liable to make ſatisfaction: ſo that though there is no legal remedy, a court of conſcience will, if it can, reach the effects of the perſons borrowing and receiving the money. If a bond is loſt, the juſtice is, that the debt ſhould be paid by the party or his heirs, though only an equitable debt then, the remedy at law being gone by loſs of the ſecurity. Nay further, a court of equity would make the ſurety, if there was one, pay the money; there being no difference between a principal and ſurety on the loſs of a bond. 1 *C. C.* 77. *Eq. Abr.* 93. So if formed in wrong words, *quadraginta* inſtead of *quadringenta*. 2 *C. C.* 225. a court of equity regards only the lending, and will follow the aſſets of the perſon receiving. If one had paid the whole, he would have remedy againſt repreſentatives of the other; which ſhews both were debtors. Executors, though not heirs, are bound by a man's binding himſelf. In *Simpſon* v. *Vaughan* 1740, *Nutt* and *Baker*, partners in trade, borrowed on their joint bond: *Nutt* died; *Baker*, the ſurviving partner, became bankrupt: (which is very like this:) the plaintiff as executor of the bond-creditor proved his debt, received ſatisfaction in part, and brought a bill againſt *Vaughan* as executor of *Nutt* to have the deficiency ſupplied out of his aſſets. The conſideration, your *Lordſhip* went upon, was, that it was a ſum lent to both, of which both had the advantage, and a debt aroſe againſt both from the nature of the tranſaction: it was no lien on the partnerſhip-eſtate in particular, becauſe the plaintiff might have had it againſt either of them: and this court leans againſt ſurvivorſhip: and that there was reaſonable evidence of fraud or miſtake, for *Baker* filled up the bond. Where a contract is abſolutely void, yet, being a contract for valuable conſideration, this court has ſet it up *in toto* to bind the heirs as well as executors; *Acton* v. *Peirce*, 2 *Ver.* 480. which ſhews, how far a court of equity goes to make it binding on heirs as well as executors, where the bond itſelf in point of law bound neither, being extinguiſhed by marriage: but it bound in equity, becauſe it is a contract; and the condition of a bond this court conſiders as a contract. So in *Blundell* v. *Barker*, a bond before marriage to truſtees with condition that if he ſhould make proviſion for the wife in 5000 *l.* *&c.* he died, having deviſed away his perſonal eſtate, and left a daughter married againſt his conſent: the bill was againſt his

repreſentatives to have ſatisfaction for a cuſtomary ſhare: the widow claimed ſatisfaction for that bond as a contract with her: it was held a good contract: on which foundation a court of equity will carry theſe things, though void in point of law, into execution. Even where there are joint contracts either by bond or contract, this court conſiders it binding on each, though one dies before. In *Probart* v. *Clifford*, 15 *March* 1738. ſettlement on marriage of the ſon for life, on his wife for life, to their firſt; *&c.* ſon in tail, remainders over, with joint covenant by father and ſon for themſelves, their heirs, executors, and every of them, that the jointure was and ſhould continue 300*l. per ann.* the father died firſt: after the ſon's death the jointure proved deficient; on the ſon's aſſets proving deficient the bill was againſt the father's repreſentatives for ſatisfaction out of his eſtate for that joint covenant; and which was at an end by death of father before the ſon: the firſt queſtion was, whether or no this was a joint covenant only; and if ſo, whether the ſon's eſtate ſhould not be liable to ſatisfaction: next, whether the words *and every of them* did not make it a ſeparate covenant. Your *Lordſhip* did not determine the queſtion, whether joint; but, whether joint or not, that the father's eſtate was liable on foundation of the contract between the parties, and decreed accordingly. In *Primroſe* v. *Bromley*, 14 *December* 1739. *Richard Mead* and two others were joint aſſignees under commiſſion of bankruptcy; and by the deed of aſſignment all covenant jointly for themſelves, their executors and adminiſtrators, with the commiſſioners, that they will from time to time get in the effects and eſtate of the bankrupt, and render a juſt account of what they, their executors and adminiſtrators or any of them, ſhall receive: *Mead* received the money, and died before the others: application was made to the Maſter to prove this debt, that *Mead* was liable to pay this debt thus contracted for. It was inſiſted, that though liable to pay this as a debt, becauſe he received the money, yet it ſhould be as a ſimple contract: the queſtion was not, whether or no *Mead* was not a debtor for it, but whether his eſtate was not a debtor for it on the foot of a ſpecialty. On exceptions the queſtions were two: firſt, whether or no this was a joint covenant, or joint and ſeparate from the ſubſequent words? Your *Lordſhip* would not determine that, but went on the other queſtion, that it was a debt by ſpecialty. Theſe two caſes are in point: both on joint covenants: and where it was determined, that the repreſentatives of the party dying ſhould make ſatisfaction. In theſe caſes indeed the heirs are not bound; but that makes no difference; the point is ſettled by it, that, though the bond is at an end in point of law, yet on account of the contract the eſtates ſhall pay. In the preſent the heirs are meant to be bound, and ſo a part of the contract. In *Welſh* v. *Harvey*, 22 *Feb.* 1739. precedent to plaintiff's marriage her intended huſband gave her a bond, executed by himſelf, by which he bound himſelf, his heirs,

executors, and adminiſtrators to pay her at his death 300*l.* he died, and by will gave her 300*l.* this, the executor inſiſted, could not be paid, for that he had not aſſets to pay all the legacies and ſimple contract debts, and that the bond was void in law, becauſe before marriage which put an end to it: ſhe brought a bill againſt the perſonal and real repreſentative for ſatisfaction out of the real, for what could not be out of the perſonal, aſſets. The queſtion was, whether the heirs in equity were bound; though in law neither heirs nor executors were. Your *Lordſhip* held, that heirs being intended to be bound originally, you would ſet up this contract, though void in point of law, according to the caſe in *Ver.* and ſtrange to ſay, it would be ſet up in reſpect of executors, not as to heirs. The real and perſonal aſſets of *Church* are therefore liable in equity. Another defence ſet up is, that though plaintiff might be intitled, he has loſt the benefit of it by *lacheſs*. That is uncommon; but what is the *lacheſs?* That there was an opportunity of recovering this from *Owen*, when he was able to pay. Can that rebut plaintiff's equity? If ſo, it is incumbent on defendants to ſhew it. There was no agreement that *Owen* would take this on himſelf, or admiſſion by him that he had partnerſhip-effects ſufficient for that. Each muſt know, he was liable to pay it. Plaintiff has nothing to do with the partnerſhip, though this might be borrowed on the partnerſhip-account. *Biſhop* is not obliged to call on *Owen*; having two ſecurities: and there was no probability of *Owen*'s diſcounting it, for he was neceſſitous. They ſhould have called on him; ſo that the *lacheſs* is on their ſide. Next, though *Church* has by will diſcharged ſome debts due to him, they cannot be diſcharged againſt creditors; but are mere legacies; for if ſuch legatee dies before teſtator, it is lapſed, and becomes a debt again to teſtator; as has been determined.

For defendant, ſurviving executor of *James Church*. *Biſhop* was acquainted with this partnerſhip; dealing with them ſeveral years; and in the courſe of it lent them this on the partnerſhip account. Both bonds were filled up by himſelf; both are joint, and have not the words *or ſeverally* added. The intereſt continued to be paid out of the partnerſhip-account down to the laſt account before the death of *Church*, which was ſettled; and among the ſums due from the partnerſhip theſe two were reckoned. On his death the right between his repreſentatives and *Owen* was, that *Owen* ſhould keep the whole partnerſhip-ſtock, pay all the debts due from the partnerſhip, for the ſurvivor was to be charged with all the debts according to the articles, and was only to pay the repreſentatives of *Church* his ſhare of the clear reſidue. In 1742 there was application to *Biſhop* by Mr. *Clive*, ſolicitor of the executors, telling him that ſufficient was left of the partnerſhip-effects in the hands of *Owen*, and particularly

cularly to pay him, and desiring him not to delay receiving satisfaction from *Owen*, and that *Bishop* would either sue him himself, or let them have the bonds to do it in his name; with which *Bishop* did not comply. In conscience and equity *Owen* was to pay all the debts; *Bishop* never applied to the executors of *Church* as liable for interest or principal, or that he suspected the circumstances of *Owen*; he regularly received from *Owen* the interest on both bonds, acquiescing under his being paymaster; and beside deals with him to amount of 1500*l. per Ann.* If *Owen* could not have paid, if applied to, *Bishop* should have appriſed the executors, and proposed to them to call on him. It is unjust to give credit to another to prejudice of a third. After the death of *Bishop* there is a suspicion of the circumstances of *Owen*; and then is application made to the executors, who are told, they are also bound. On looking into the bonds after the bankruptcy it appears, that in law *Owen* is only bound; so that no demand could be at law; which occasions a bill to be relieved on equitable grounds against that, which is the rule of law; suggesting that is was a mistake, and that in a court of equity it ought to be considered and set up as joint and several. The general question will be, whether there is sufficient cause for the court to do that, taking it to be joint in point of law, as it is, and the survivor then only debtor according to the rule in *Lit.*? It is said, the condition, that both shall pay, makes it several; but it must be so to save the penalty, if paid by them, or either, or executors of either. The condition is properly applicable to that, and to a joint bond supposing that so intended; so that it is not a new agreement. Next the construction in a court of equity: the proposition laid down is, that all bonds, joint in point of law, are considered as several in equity; but there was never such a determination. A court of equity will not without circumstances extend the agreement of the parties; will not alter it, if meant that the survivor should be the debtor: so that it cannot be thus in general, the court never determining it but on circumstances; from which it will be dangerous to draw a general rule. *Probart* v. *Clifford* is not the case of a bond, but of a joint covenant; which was determined on this particularity, that it was an express agreement, which the court was to carry into execution according to the intent of the parties, which was plain, that the father was to be bound severally as well as the son. *Primrose* v. *Bromley* went on several circumstances; and so it was distinguished in *Simpson* v. *Vaughan*; where the first question was, whether the court can give further remedy, than the law does in cases of this kind? Secondly, whether there was particular evidence to do it there? As to the first the court held, it could not be laid down in every case of a joint bond; for *Probart* v. *Clifford* was an executory agreement; and *Primrose*

v. *Bromley* depended on a great many circumſtances: but as to the next queſtion, *Baker*, one of the partners, filled up the bond; which was either a fraud or miſtake to his own advantage; either of which might be a ground to interpoſe. It ought to have been joint and ſeveral, if he had done it right. Another ground was, that the money had come to the benefit of both partners. *Nutt*, who died, was conſiderably indebted to the partnerſhip: if then *Baker* had paid all, he would be intitled to ſatisfaction out of *Nutt*'s aſſets for a moiety; why therefore ſhould not the creditors have like remedy? On the reaſon, relief was in that caſe, there ſhould be none in this. The caſes of married women are not applicable; only proving that if an agreement is made in form of a bond, which is not good in law on account of the marriage, yet if under hand and ſeal, it is a ſpecialty, and this court will ſubſtantiate it though in form of a bond: but here is no agreement, which can be gone upon and the bond ſet aſide. Where a bond is loſt, the court will ſet it up, and ſupply the loſs; and will correct a plain miſtake: but it muſt appear, and a ground for it. There is no evidence of miſtake here. No impoſition, becauſe filled up by obligee himſelf. It is hard to account for the ſame miſtakes happening twice at a diſtance of time. Probably the bonds were adapted to the nature of the articles of partnerſhip, which *Biſhop* knew. It might be deſired to be joint on that account. There was no third perſon concerned in the drawing, that can be now examined: ſo that it is enough, that it is probable. The court is not to preſume without any evidence, that, when two bonds are adapted to ſuch articles, and accounts annually taken, it is a miſtake: which brings it to the ground of equity; and that ſhall be allowed it's full weight; but is anſwered and rebutted by an equity of the ſame ſort on defendant's part. The equity inſiſted on is, that both have had the benefit, the money coming jointly; therefore both are liable in juſtice to make ſatisfaction; and that if one had paid it for the other, he or his repreſentatives would have a right to come on the repreſentatives of the other for a contribution, and a common creditor ſhould have the ſame equity. Allowing full weight to that argument where there is no anſwer to it, all the principles of it fail, when an equity of the ſame kind ariſes againſt *Biſhop*. He had notice of money left in the hands of *Owen* for the very purpoſe of paying theſe bonds: yet lies by with his eyes open; not putting the executors on their guard: he received the intereſt from, and gave ſubſequent credit to, *Owen*; and ought therefore to ſuffer within the rule on bills of Exchange. If the executors pay it, it muſt be paid twice over: firſt in the account with *Owen*; next becauſe not got out of his hands. If in point of law the executors of *Church* were liable, there is a difference between that equity,

which rebuts an equity, and that which is ſufficient to ſet aſide a legal right: but the law happens to be with the executors, and conſcience alſo.

The accounts were offered to be read for defendants but not allowed.

LORD CHANCELLOR.

If it ſtood barely on the lacheſs of *Biſhop*, and on that from which a little colluſion with *Owen* may be inferred, I think, it is a conſiderable defence made. But after the death of *Biſhop* the repreſentatives of *Church* thought themſelves liable, and applied to have theſe bonds put in ſuit; this circumſtance creates a doubt in my own determination: therefore I ſhould be glad to know, what *Biſhop* anſwered to Mr. *Clive*, defendant's ſolicitor on his application. He has been examined for defendants; and the anſwer is general, that he could not prevail on him to do it: ſo that I will decree *Clive* to be examined on interrogatories as to that: unleſs the plaintiff oppoſes it; for in that caſe I will give my determination on the evidence before me. The court has ſometimes directed a witneſs to attend perſonally, where they have had a doubt; and this, I own, is an exceeding doubtful caſe.

Witneſs directed to be examined on interrogatories, or to attend perſonally.

There is one Thing, I will give my opinion upon now, as to the queſtion made in point of law.

The bill is for ſatisfaction of a duty out of aſſets; which the plaintiff might do either on a debt due in point of law, and for which there might be a legal remedy, or where equitable; for though in general a legal demand cannot be turned into equitable, yet if a demand is made out of aſſets, he is intitled to an account out of the aſſets here; and then this court will not put him to ſue doubly, in one court to have account of aſſets, in the other ſatisfaction, but gives remedy here. The firſt thing mentioned was to make theſe bonds ſtill a legal demand againſt the aſſets of *Church*. Now if that be ſo, the plaintiff would be at liberty, and has an option, to proceed at law for this debt or in equity. But it will not be now inſiſted, that the plaintiff can purſue by action at law on theſe bonds. It is on the face of it merely joint. Then the ſeverance in the condition ought to be taken into conſtruction of the obligation, and makes the obligation joint and ſeveral. The firſt anſwer given to that is, that the condition is only, if it is performed, an excuſe againſt the penalty. So it is in truth; but that is not a ſufficient anſwer as to the equity of

If a demand out of aſſets, though remedy at law, ſatisfaction here.

Though bond joint only, both bound in equity, and ſo of a ſurety, if that equity is not rebutted.

the caſe, though it is in point of law. The joint obligation muſt be conſtrued with that rule, the law lays down, and the conſequence of it, that the remedy ſurvives by death of one: yet ſtill it is a joint ſecurity by them, that one or other of them ſhall do the act. Suppoſe a bond by two, one as principal, the other as ſurety, with a condition (which is the common caſe) that if the principal pays the money, the obligation is void; it cannot be conſtrued to be intended, that the principal only was bound; ſtill both are bound: but according to the conſtruction the law puts on that obligation, that the principal ſhall do the act; but if not, it is on both. Theſe words therefore, which may amount to a ſeverance as to the original contract, yet cannot enable plaintiff to declare on this as if a joint and ſeveral bond; and it is immaterial to leave plaintiff to take his chance, whether he can recover at law: but as the plaintiff inſiſts not on it, it is a caſe in equity, and turns on equitable circumſtances. Then the plaintiff muſt come as from a pure fountain; muſt ſhew himſelf not to be guilty of any lacheſs, much leſs colluſion, turning to the prejudice of the other ſide; which might be ſtrong enough to rebut that equity, ſet up beyond what the rule of law admits, though not ſufficient to get the better of the legal. Which brings it to the evidence: and that is uncertain, from the not knowing what anſwer was given on the application by *Clive*; for it might be a general acquieſcence by both: but that is very much in the dark.

I declare therefore, that I do not think fit to proceed to a determination of this caſe, till he is examined before the maſter on interrogatories as to the application, mentioned in his depoſition to be made by him to demand the money due on theſe bonds of *Owen*, or to give leave to put the ſaid bonds in ſuit in *Biſhop*'s name againſt *Owen*; and what anſwers were given him by *Biſhop*, and what declarations: with liberty to the plaintiff alſo to interrogate: and afterward either ſide may apply to have it further heard. *Post* 371.

Salkeld *verſus* Science, *Dec.* 14, 1750. Caſe 37.

TO a bill for account and diſcovery, plea of releaſe, farther and other than in the plea ſet forth.

In ſupport of this plea it was compared to a plea of purchaſe for valuable conſideration; on which defendant has a right to plead to diſcovery of deeds and writings; but muſt except his own purchaſe-deeds; for he pleads them; and therefore muſt ſay, ſave

Plea of releaſe other than in plea ſet forth: on the ſubſtance to ſtand for anſwer.

ſave as in the plea ſet forth; for the plea would be over-ruled, if one pleads to the whole, and afterwards ſets out any part; and this is the ſame in effect.

LORD CHANCELLOR.

There are two objections to this plea; of form and ſubſtance.

Pleas containing exception of matters after, over-ruled.

As to the firſt (which might come to be ſubſtantial alſo) it is an odd plea; but I ſhould not for that over-rule it. All pleas in this court, containing exception of matters herein after mentioned, are bad; becauſe impoſſible for the court to judge, what that plea covers, without looking into the anſwer; which may be ſufficient, or not; and the court muſt judge of the ſufficiency of the anſwer, before they can judge of the validity of the plea; which is prepoſterous: and if imperfectly ſet forth, how can there be exception to it? Such plea therefore always is over-ruled. This is not expreſſed in that manner: but it is a pretty odd exception, and would have made it bad, if it had not been for the particular ſubſtance of the plea; for ſuch exception would turn the plea into an anſwer: nor could the plaintiff have the benefit of excepting, being covered by that plea. But the only ſums, mentioned in the plea, are mentioned in the releaſe; and there being no other ſums, it is the ſame, as if the exception had been other and further than is in the releaſe herein aftermentioned; which would have been proper and right; and the releaſe being part of the plea, it is the ſame thing. That incorrectneſs therefore is not ſufficient to over-rule the plea.

But the material and ſubſtantial part is as to the charges of an account being made up and dealings; which requires an anſwer and diſcovery: but this plea goes to diſcovery of all that, being to diſcovery or account of any perſonal eſtate of teſtator. If I ſhould now allow this plea, it would be impoſſible for plaintiff to except.

Let it ſtand for an anſwer, *&c.*

Caſe 38. Weaver *verſus* Earl of *Meath*, *Dec.* 14, 1750.

Defendant may plead to diſcovery of

PLEA to a particular fact in the Bill, whether defendant was tenant for life; becauſe it would ſubject him to a forfeiture, he having made a leaſe for life of another, which would be a diſ-

diſcontinuance of any remainder over, who might enter for that forfeiture: therefore a court of equity will not compel a diſcovery of it. So if it was to diſcover a crime. In *Eaſt-India company* v. *Atkins* the queſtion was, whether defendant was bound to give an account of a clandeſtine trade; on which trade he had covenanted to make ſatisfaction for loſs ſuſtained thereby, and that by ſtated damages; and alſo covenanted, that he would not plead or demur to any bill to be brought in equity to diſcover ſuch trade. The defendant pleaded notwithſtanding: and it was admitted on all hands, that if it had not been for that covenant, he would not be bound.

the act cauſing forfeiture: but not to diſcovery of the eſtate, as whether he is tenant for life or not.

LORD CHANCELLOR.

Suppoſe a bill for diſcovery of waſte, charging defendant to be tenant for life, and that he committed waſte; and praying that he may ſet forth and diſcover, whether he is not tenant for life: he may plead to the diſcovery, whether he hath committed waſte or not, but not whether he is tenant for life or not. The plaintiff will be intitled to have ſuch diſcovery; he may plead to diſcovery of the act cauſing the forfeiture; but this not a plea to that, but to diſcovery of the eſtate. There never was ſuch a thing heard of: conſider, how far it would go. Suppoſe, tenant for life makes a conveyance in fee for valuable conſideration with covenant for farther aſſurance: and there is a bill for that farther aſſurance, or for ſatisfaction on the foot of that covenant. Can he plead, that he is but tenant for life, and may forfeit his eſtate to another? Beſide it does not neceſſarily incur a forfeiture; for he may be tenant for life with a power; which is a common caſe.

Therefore over-rule the plea.

Gregor *verſus* Moleſworth, *Dec.* 14, 1750. Caſe 39.

DEMURRER to bill of review; becauſe no errors on the face of the decree; and that beſide there was length of time, which would prevent opening the inrolment.

Length of time proper for plea, not demurrer.

LORD CHANCELLOR.

That is not a proper matter for demurrer, but ought to be pleaded; for ſeveral exceptions may take it out of the length of time; as infancy, coverture; which the party ſhould have the advantage of ſhewing, and which cannot be done, if demurred to. The queſtion now is, whether there is error on the face of

the decree? There plainly is: whether it was cured afterward, is another conſideration. Over-ruling this demurrer is of leſs effect than over-ruling any whatever; for it is only to open the inrolment that the court may hear the cauſe, as it ſtood, with all the ſubſequent facts. Therefore overule it.

No ſaving on a demurrer. It was deſired to ſave the benefit of the exception of length of time.

LORD CHANCELLOR.

I can ſave nothing on a demurrer.

Caſe 40. Gower *verſus* Mainwaring, *Dec.* 17, 1750.

Ante. p. 87. 5 December. THIS cauſe coming on again, *Lord Chancellor* ſaid, it appeared plainly, that plaintiff could have no more than 800*l.* out of the reſidue; ſo that ſhe was out of the caſe: and the remainder ſhould be divided between her brother *Gilbert* and a ſon of her deceaſed ſiſter according to their neceſſities and circumſtances; which the Maſter ſhould inquire into, and conſider, how it might be moſt equitably and juſtly divided. It was very difficult for the court to take on them to determine a queſtion of that kind, in a family, and to judge of neceſſities and conveniences. Suppoſe, teſtator had by will left his perſonal eſtate to be diſpoſed of among his family, as the court of *Chancery* ſhould think fit: could the court have done it otherwiſe than according to the ſtatute of diſtribution?

Caſe 41. Child *verſus* Brabſon, *Dec.* 18, 1750.

Defendant in cuſtody for want of further anſwer, puts it in; diſcharged on paying coſts of contempt. DEFENDANT was taken on a ſerjeant at arms for not putting in an anſwer: he afterward put in anſwer, and was diſcharged: the anſwer was reported inſufficient, and he was taken again; and now moved to be diſcharged out of cuſtody of the meſſenger on paying coſts of contempt, *&c.* the queſtion was, whether he ſhould, before the further anſwer was reported ſufficient, or not?

On inſufficient further anſwer, proceſs where left off. An order by his *Lordſhip* in *Duport* v. *Ward* was mentioned; where defendant put in an anſwer after great delay and proceſs of contempt. It was referred for impertinence, and reported ſo; the impertinence was expunged, the coſts taxed, and *ſubpæna* iſſued for them. The anſwer on exceptions was reported inſufficient, and *ſubpæna* to put in a better anſwer, and on contempt to a ſerjeant at arms. A further anſwer was put in; and plaintiff inſiſted, he ſhould remain in cuſtody, until the anſwer was reported full. On that

that it came before the court; and defendant on paying coſts for not putting in a further anſwer was diſcharged.

LORD CHANCELLOR.

Where the firſt anſwer is reported inſufficient, and the party taken on proceſs for not putting in a further anſwer; he afterward puts in a further anſwer, and pays the coſts of the contempt, (for until then it is no anſwer) the courſe, I take it, is, that he muſt be diſcharged: and if the anſwer is afterward reported inſufficient, you may carry on the proceſs of contempt at the proceſs you left off: but I never heard, that he ſhould lye in cuſtody, until the Maſter reports, whether the anſwer was ſufficient or not; which may be reported either way, and that after a long time. In caſe of an inſufficient further anſwer, you are to take up your proceſs of contempt, juſt where you left off; which would not be ſo, if he was to lye in cuſtody during that time. The caſe cited ſeems to me in point: and, as I remember, I was there inclined, that he ſhould remain in cuſtody becauſe of the great obſtinacy in not anſwering.

The motion allowed.

Taylor *verſus* Lewis, *Dec.* 20, 1750. Caſe 42.

Whether fix clerk can ſtop until paid fees, which had been paid to 60 clerk, who abſconds.

PETITION to compel Mr. *Reynardſon*, fix clerk, to ſign a certificate of the time of filing replication; who objected, until he was paid his fees; which were already paid by the client to *Bignel*, the 60 clerk, who abſconded.

For *petition*. The queſtion is, whether for inſolvency of the ſworn clerk all the ſolicitors and all their clients are anſwerable to the ſix clerk; ſo that, if not paid, he may ſtop proceedings in any ſituation. There is an order in the printed book of rules and orders in 1668, by Lord *Keeper Bridgman* and Sir *Harb. Grimſtone*, which eſtabliſhes this; that the ſix clerk cannot come on the client or ſolicitor, but muſt on the 60 clerk, for his fees; on which order the ſworn clerk is made an independent officer of the ſuperior or ſix clerk, ſo as not removeable at his will. With him is the client or ſolicitor to have privity or connexion; ſo that payment to him is concluſive to the ſix clerk; and he is not obliged to pay twice, having paid the proper hand. The practice ſince has been, that the 60 clerk has taken on him to pay the ſix clerk; between whom and the client all intercourſe is cut off. *Coker* v. *Farewell*, 2 *Will.* 460. is like this; and every reaſon there, ſtronger here.

E con.

E con. An officer of this or other court is not bound to act, unleſs fees are paid: nor will the court take out of their hands papers, *&c.* which ſhall remain as a lien. There is an order by Lord *Clarendon*, where the court will ſtop the very hearing the cauſe, if fees are not paid. On petition to compel Mr. *John* a 60 clerk to deliver up papers it was ſaid, he was paid his fees by payment to the ſolicitor on the authority of *Coker* v. *Farewell.* Your *Lordſhip* ſaid, you would not make an order for the writings, but refer it to a Maſter to ſee, what was due to him as clerk in court in the cauſe, and then would make a further order. This order was to tax his bill: but founded on this, that the papers were not ordered to be delivered without payment to him.

LORD CHANCELLOR.

I take it, that the party has changed his clerk in court in this cauſe: but it is the ſame ſtate, as if *Bignel* remained now clerk in court, and came and demanded certificate of the time of filing replication to found a motion upon. In that caſe could the ſix clerk have refuſed until paid his fees? Is he bound to do that office until paid? In a court of common law one cannot change his attorney without leave of court: ſo that I do not know, that a 60 clerk may be changed at pleaſure of the party, or that the ſecurity of the ſix clerk can poſſibly be changed by changing the 60 clerk.

It ſeems a 60 clerk cannot be changed at pleaſure.

It being alleged, that there was a compoſition between *Bignel* and the ſix clerk, *Lord Chancellor* deſired it to ſtand over, until that fact was aſcertained; for if ſo, all theſe queſtions were out of the caſe.

The matter was afterward made up.

Caſe 43. Maraſco *verſus* Boiton, *Dec.* 19, 1750.

MOTION for ſpecial injunction to ſtay navigating a ſhip after appearance.

LORD CHANCELLOR.

After appearance no ſpecial injunction without notice.

You cannot move it without notice: eſpecially in ſuch a caſe which is of great conſequence to trade; as then injunctions might be granted *ex parte* only to the navigating all the ſhips in the *Thames.* If I could have granted an injunction on petition, I would, becauſe there appeared ſome kind of oppreſſion. I could not do that by the courſe of the court: but I granted a *ne exeat regno.*

Biſhop *verſus* Willis, *Dec.* 19, 1750. Caſe 44.

MOTION to diſcharge an order made on petition.

LORD CHANCELLOR.

It is not the courſe of the court to move to diſcharge theſe orders on petition made on hearing counſel on both ſides. On petition *ex parte* indeed it is done every day. I do not ſay, there may not be ſuch a caſe: but I know no inſtance of it, when made by the *Lord Chancellor*. How it is, when made by the *Maſter of the Rolls*, I know not.

Order on petition not diſcharged on motion; unleſs ex parte.

Anonymous, *Dec.* 20, 1750. Caſe 45.

A Decree having ſettled a portion of a wife to be laid out in land for huſband for life, for wife for life, and the iſſue; petition to have part to pay huſband's debts, and the reſt to wife's ſeparate uſe, upon ſuggeſtion that there was no probability of iſſue, and that huſband had been long in priſon and in infinite diſtreſs.

LORD CHANCELLOR.

I cannot do it, unleſs veſted with a legiſlative authority: and have known theſe ſuggeſtions of no probability of iſſue made in parliament, and yet bills refuſed.

Ex parte Wyldman, *Dec.* 20, 1750. Caſe 46.

Bankrupts.

BUCKLE, a debtor to *Wyldman*, gave him bills of exchange, amounting to the whole or part of his debt, on *Peter Vanhylik* in *Holland*, who was debtor to *Buckle*. Three of them were accepted; but the failure of *Vanhylik* in *Holland* occaſioned the bankruptcy of *Buckle* here. A compoſition was made by *Vanhylik* for his debts in *Holland*; *Wyldman* received nothing under that compoſition before the bankruptcy and proof of his debt under the commiſſion; and was admitted a creditor for his whole debt: but before the dividend made he had in fact received 2*s.* and 6*d.* in the pound out of the eſtate of *Vanhylick* under that compoſition.

Two debtors; one becomes bankrupt: creditor proves his whole debt, but before dividend receives a compoſition from the other: he ſhall ſtill have a dividend in proportion to the whole.

Otherwiſe if he received the compoſition before the bankruptcy.

Wyldman petitioned to be let in for a dividend in proportion to his whole demand. Any oppoſition to this was improper in point of form; becauſe the admiſſion of him as a creditor intitles him thereto; and having two ſecurities, he has a right to come under both. *Ex parte Royd*, 13 *April* 1741. petition to be admitted a creditor on a promiſſory note by one, who afterward became bankrupt: it was indorſed by meſne indorſements to the petitioner; but objected by the aſſignees, that the ſame note had been proved under another commiſſion againſt the indorſor; yet your *Lordſhip* held, he might ſtill prove it under both commiſſions: then he muſt have a dividend under both commiſſions. So *ex parte Bennet* 1743, the petitioner before the bankruptcy of *Lingwood*, whoſe creditor he was, accepted a compoſition by inſtalment, and on the bankruptcy petitioned to be admitted a creditor for the remainder of the original debt independent of the compounded debt. It was firſt objected, that the debt was reduced to 11*s.* in the pound by the compoſition; next that petitioner had other perſonal ſecurity for his debt. Your *Lordſhip* held, that now he had a right to come in for the whole debt, as the compoſition was not paid; and that until it appeared, what he could recover on thoſe ſecurities, that could not come in queſtion; he might therefore come under both ſecurities. Then this petitioning creditor, having two demands againſt different perſons, cannot be compelled to deliver up the ſecurities, but may come againſt both.

For aſſignees of Buckle. The aſſignees ſent over to the agent of *Vanhylik* to receive the compoſition there; but were anſwered, that *Wyldman* was intitled to the compoſition on account of the three bills, and therefore they muſt accept of a compoſition of the reſidue. Then he is not alſo intitled to prove his debt independent of that compoſition. His being admitted a creditor was at a time, when it was not known, that the bankrupt's eſtate would receive any thing from theſe ſecurities; he was therefore received a creditor on his affidavit, that he had no ſatisfaction for his demand. The inclination of the court, if any, will be in favour of the creditors at large, and not to put one in a better condition than others. In *Cooper* v. *Pepys*, *April* 1741, notes were given to one, who indorſed, and became bankrupt; indorſee comes on the drawer, who being unable to pay becomes bankrupt alſo. A doubt aroſe, whether the creditors, who accepted a compoſition; may notwithſtanding prove their whole debts in the commiſſion againſt *Reeves*: your *Lordſhip* on conſideration and the caſes cited held clearly, that the compoſition muſt go in diſcharge of ſo much of the debt, and they could only prove the remainder under that commiſſion: which is in fact this very caſe. This is like, what happens every day as to perſons having real ſecurities for their money: and reaſon ſpeaks it: if the incumbrance is ſuch, that

that there is no neceſſity to have recourſe to the eſtate of the bankrupt for ſatisfaction to make good the deficiency, they are intitled to receive 20*s.* in the pound for their demands: but if the real ſecurity is deficient, they cannot come under the commiſſion to take advantage out of the common fund, but for ſo much as their debt amounts to, deducting what was before received for the produce of the pledge out of the whole debt, and come in as creditors for the reſidue.

LORD CHANCELLOR.

This is a very plain caſe, both on the general principles and what has been already determined more than once. On the acceptance of the three bills *Vanhylik* became perſonally liable for the money for which they were drawn, and to give a ſatisfaction for them; conſequently the petitioner had, *pro tanto*, two ſecurities for his debt; that is, two perſons liable for the ſame debt. Then conſider how it would have ſtood in common caſes, abſtracted from the commiſſion of bankruptcy. The obligee in a joint and ſeveral bond may bring ſeveral actions of debt at the ſame inſtant of time; proceed to judgment; and take out execution for his debt: but can levy but one ſatisfaction. If he levies a double ſatisfaction for that demand, they are relievable in equity, and even in law; for a court of law will interpoſe to prevent that, and order reſtitution of what is over and above a full ſatisfaction for principal, intereſt, and coſts. So in caſes of bills of exchange or promiſſory notes, where there is a drawer and indorſer, perhaps more than one, judgment is againſt all; but there can be but one ſatisfaction. Then ſuppoſe any, or two of theſe perſons become bankrupt; he may come in under each of theſe commiſſions, and prove his whole debt under each, and is intitled to receive ſatisfaction out of either or both their eſtates, according to the dividends to be made, until he has received ſatisfaction for his whole debt: and this is not a preference given to him out of the eſtate of either of the bankrupts; having a double ſecurity, and not law or equity to take it from him. In the caſe put for the aſſignees, it is true, that if before the bankruptcy he has received from one, payment of part of his debt, if the other becomes bankrupt, he can prove only the reſidue of the debt under this commiſſion, becauſe no more remains due to him: and the form of proving his debt ſhews this; ſo that he is bound to accept that as ſatisfaction *pro tanto*. Conſider the preſent caſe: two perſons are liable to this demand, one is a bankrupt, the other is not ſtrictly ſo; but has made a compoſition, which is low in reſpect of the debt: under that *Wyldman* receives nothing before the bankruptcy, but was a creditor for his whole money at the time of the bankruptcy and proving his debt; and is admitted as ſuch, having received no ſatisfaction; but before the preſent dividend made, has received two ſhillings and ſix-pence in

Remedy againſt ſeveral debtors, but one ſatisfaction.

the pound out of the eſtate of *Vanhylik* under that compoſition. The aſſignees inſiſt, this two ſhillings and ſix-pence in the pound ſhall be deducted out of his original debt proved, as if it had been paid before: but that is a wrong method of putting it; nor can there be a caſe for that. It is true, it is more beneficial for him than if it had happened otherwiſe; *viz.* if he had received a partial ſatisfaction before he had proved his debt; for then he could only come for what remained due; but this was received ſubſequent, when both were liable: ſo that ſtill he ſhall come under the commiſſion, until he is paid the whole. Otherwiſe it would be taking away the benefit of his double ſecurity: but it is a rule of law and equity, that a man may make uſe of all the ſecurities he has, until he receives a ſatisfaction for his whole debt. Indeed if it happens, that before he takes any remedy he received a ſatisfaction, he could not poſſibly ſwear himſelf a creditor for more: but as this was not before, it will go by way of deduction, ſubſequent to the time of proving that debt. Conſequently he is intitled to receive his dividend in the manner the Commiſſioners have determined. The caſes cited for the petitioner are proper for this.

Take the order therefore according to the prayer of the petition, except as to the coſts; for the aſſignees were not to blame in bringing this before the court.

Caſe 47. Duke of Bedford *verſus* Coke, *Jan.* 14, 1750-1.

Crown, or its grantee, on forfeiture takes the eſtate ſubject to all charges binding the party, though voluntary, if no fraud; but not ſubject to debts at large; and has the ſame equity to be relieved againſt a conveyance, as the party had for fraud on him.

ON exceptions concerning only two demands of Dr. *Young*, firſt under a grant of annuity or rent-charge of 100*l.* *per ann.* in 1719. next under a judgment obtained in 1722, on a bond of *A.* the queſtion was, whether Dr. *Young* ſhould be preferred to Lady *Jane Coke* and the other ſiſter of *A.* to whom on the attainder of *A.* the ſurplus of his eſtate was granted by the crown.

LORD CHANCELLOR.

I take it to be determined by the former orders and decrees between the parties, that both theſe demands are to be ſatisfied out of the ſurplus of *A.*'s eſtate after debts and incumbrances for valuable conſideration created by *A.* before his attainder and committing treaſon; ſtill leaving it that they were demands out of the eſtate, altho' on marſhalling the ſeveral demands, the court held, they were to be paid according to priority in point of conſideration, not of date.

But ſuppoſing it not ſo determined, and that it was ſtill open, what would be the right of the parties? Conſider it in reſpect of the crown and of Lady *Jane Coke*, who ſtands in the place of the

crown: the crown certainly might have two kinds of equity or defence againſt ſuch a demand as this; firſt, ſuppoſing the grant of annuity obtained by fraud or impoſition from *A.* the crown, coming in on foot of the attainder, and having all rights veſted in *A.* by his forfeiture, might have taken advantage of the fraud; and though it was by conveyance, which would have affected his eſtate in the hands of the crown, would have the ſame equity to be relieved againſt it; and ſo might Lady *Jane Coke* in the place of the crown. But the crown might have another equity, which *A.* could not; *viz.* if *A.* had voluntarily and deſignedly made ſuch a grant to incumber his eſtate in the hands of the crown with a view to his high treaſon, the Crown and Lady *Jane Coke* would have a right to diſpute that demand, and be delivered therefrom, as fraudulent; and there are ſeveral caſes, where ſuch colluſive conveyances on pretended conſideration to incumber the eſtate, have been held fraudulent in hands of the Crown, though it would not in hands of the party forfeiting. But no ſuch defence is inſiſted on for the Crown or Lady *Jane Coke*, that theſe demands were obtained by fraud or impoſition on *A.* They were inſiſted to be voluntary; but that is not a defence in the mouth of the Crown or of Lady *Jane Coke*; becauſe the crown on a forfeiture takes the eſtate ſubject to all charges and incumbrances, which would have bound the party forfeiting, and muſt be bound too, where no fraud in reſpect of the Crown. That is, where it is a conveyance, which is a charge on the eſtate; for to be ſure the Crown is not ſubject to debts at large of the forfeiting party, the creditors whereof being quite without remedy; as there is no ſuch law in *England* letting in debts at large, though there is in *Scotland:* but the Crown muſt take the eſtate liable to the charges thereon. Here the grantee of this rent-charge, and the creditor by judgment, might have come into the Exchequer by the remedy given by the ſtatute by *Monſtrance de droit, &c.* to remove the King's hands until theſe demands are paid. Then Lady *Jane Coke* cannot be in a better condition than the Crown would be. It is not diſputed on the head of fraud or impoſition on *A.* himſelf. As to the queſtion whether voluntary or not, if fairly obtained, and binding on *A.* it would be binding on Lady *Jane Coke.*

I will give no intereſt for arrears of a voluntary annuity.

Exel *verſus* Wallace, *Jan.* 28, 1750-1. Caſe 48.

At the *Rolls.* Sir *John Strange* Maſter of the *Rolls.*

ON the marriage of *William Oxford* with *Elizabeth*, daughter of *Andrew Smith*, a leaſehold eſtate called *Selburne Grange*, held of *Magdalen-College*, was ſettled in truſt to permit the huſband to receive Poſt. 22 June 1751.

Leaſe for years by deed in truſt for huſband and wife, and on death of ſurvivor truſtees to aſſign to eldeſt ſon; for want of ſuch iſſue of ſuch ſon, to aſſign to daughters. If no ſon or iſſue of ſon alive at death of ſurvivor, remainder to the daughters good; the whole not veſting in a ſon, who had been born, and died in life of the mother.

receive the rents and profits for his life, if the term ſhould ſo long endure; afterward to permit the wife to enjoy it for her life, if *&c.* after the deceaſe of them, and the ſurvivor of them, then the truſtees, their heirs, *&c.* ſhould aſſign the ſaid leaſehold eſtate, together with the rents, iſſues, and profits, to the eldeſt ſon of *William Oxford*, as ſhould be by him begotten on the body of his wife *Elizabeth*, and for want of ſuch iſſue of ſuch ſon in truſt to aſſign the ſame to and among all and every the daughter and daughters of *William Oxford* on his ſaid wife to be begotten, equally ſhare and ſhare alike: if there ſhould happen to be no iſſue male or female of their two bodies, then to uſe of *William Oxford*, his heirs, executors, and adminiſtrators. The inheritance of a ſmall copyhold eſtate was alſo compriſed herein; and there was a proviſion, that the truſtees ſhould renew the leaſe.

By this marriage there was one ſon, *William*, and two daughters, *Elizabeth* and *Anne*; the father died in 1735, *Anne* in ſome time after; the ſon died in 1745, aged about 19, without iſſue, during the life-eſtate of the mother, who intermarried with *Henry Read*, and at her death left *Elizabeth*, her only daughter then living, ſince married to defendant *Wallace*.

Deviſe of perſonal to all the children of his daughter, to be paid when by law able to receive and diſcharge; veſted in each child as they come in eſſe, and tranſmiſſible, though ſubject to be varied, and not to wait the veſting until daughter's death.

Andrew Smith had, after the marriage of his daughter with *William Oxford*, and when they had only iſſue the defendant *Elizabeth Wallace*, made his will; thereby giving to his wife ſeveral parts of his perſonal eſtate for her own uſe and benefit, and to her during widowhood the uſe and enjoyment of the reſt of his perſonal eſtate; and after providing thereout 2000*l.* for his grandaughter, he gave the remainder to the uſe of his grandaughter and all and every child and children of his own daughter, which ſhe now has, or may hereafter have by her preſent or future huſband, equally to be divided ſhare and ſhare alike, to be tranſferred, delivered and paid to them ſeverally, as ſoon as they ſhall by law be able to receive and diſcharge the ſame; and made his wife executrix, who lived unmarried, and made *Elizabeth Wallace* her executrix; who, as ſuch, was repreſentative of *Andrew Smith*, and the grandaughter named in his will, and adminiſtratrix to her brother and ſiſter *William* and *Anne*, both born after their grandfather's will, and dying under age in life of their mother; from whoſe ſecond huſband *Henry Read*, the plaintiff claiming under an aſſignment, brought this bill for an account of the ſeveral perſonal eſtates, in which the wife of his aſſignor claimed a ſhare.

Two queſtions aroſe as to what ſhould be conſidered the perſonal eſtate of *William* and *Anne* his ſiſter.

The firſt was as to the eſtate of both: the plaintiffs, as ſtanding in their mother's place, claiming a ſhare of whatever appeared to belong to their perſonal eſtate, under the ſtatute of diſtribution, they

dying inteſtate, ſhe ſurviving them, and their father dying long before: that each of their third of the perſonal eſtate of *Andrew Smith*, which by his will was divided equally, *&c.* veſted in them equally, and tranſmiſſible to thoſe intitled to the benefit of their reſpective perſonal eſtates. The defendant, *Elizabeth Wallace*, inſiſted nothing veſted in them during their lives, but that defendant was intitled to the whole as the only one who ſurvived the mother; principally becauſe, as the reſidue was to be equally divided between all her children by any huſband, the number of objects and the *quantum* would not be known until her death; therefore nothing veſted; eſpecially conſidering the ſubſequent words, "as ſoon as they are able to re-"ceive and diſcharge;" which relates to their reſpective ages of twenty-one.

The ſecond concerned the perſonal eſtate of *William* the ſon only as to the college leaſe, which was ſince renewed; in which the plaintiff contended, that if it was a real eſtate, *William* would have an eſtate tail; and that ſuch words, as in real eſtate would carry an eſtate tail, ſhould, in terms for years, carry the whole term, and the remainder over to the daughters was void in law, as tending to perpetuity; and conſequently the reſidue of the term, after death of father and mother, became part of the ſon's perſonal eſtate, and diviſible in moieties between the mother, (in whoſe place plaintiff ſtood) and his ſiſter the defendant, who, on the other hand inſiſted, her brother could only take upon his ſurviving; and by his dying without iſſue the remainder to the daughters was good, as being within that reaſonable compaſs of time the law allows; conſequently ſhe was intitled to the whole.

His Honour, having taken time to conſider, now pronounced his decree.

On the firſt, I am opinion that one third of the reſidue of the perſonal eſtate of *Andrew Smith*, veſted in *William*, and another third in *Anne*, and is to be conſidered as their reſpective perſonal eſtate diviſible. There are no words in this will confining the diviſion of this reſidue to ſuch children of *Elizabeth Oxford* as ſhould be living at her death; for that would have poſtponed the veſting the intereſt until that event: ſo that it is only a bequeſt of the perſonal eſtate to be equally divided among all the children, wherein the intereſt veſts in each as ſoon as they come *in eſſe*, ſubject to be varied as to the *quantum* of the proportions as they ariſe, but ſtill veſted and tranſmiſſible to their repreſentatives. It is only the common caſe of the deviſe of the uſe of it to *A.* for life, and after her deceaſe to *B.* where even the circumſtance of *B.*'s ſurviving *A.* is not neceſſary; for ſtill the repreſentative is intitled. Both *William* and *Anne* had a right to call on the repreſentative of *Andrew Smith* to place

Deviſe of uſe of perſonal to A. for life, and afterward to B. though B. dies firſt, tranſmiſſible.

place it out for their benefit, being under age, both surviving the widow of *Andrew Smith*. It is objected however, that defendant appears to be the principal object of testator's regard, and not likely to be affected by the births of her brother and sister, who did not live to be intitled to any share of the residue: but that regard is sufficiently answered by the 2000*l.* she was to have out of the residue in the first place and in all events. One third therefore is to be considered in the account, as personal estate of *William*; one moiety to the plaintiff in place of his mother, the other to defendant his sister and administratrix: another third is to be considered as *Anne*'s, who dying before *William*, it is to be divided into thirds; one to the mother for plaintiff, another to *William*; the third retained by defendant.

remainder of lease for years on general dying without issue, too remote.

Otherwise if without issue living at the death.

The other, and more difficult point, depends on the construction of this deed; for the general principles cannot be disputed: a remainder over on a general dying without issue is too remote, and cannot be supported; but if to be considered as a dying without issue living at his death, the remainder to the daughters will be good. Some words must have been omitted in the ingrossment; as will appear from reading this clause. The first words *such issue*, if they stood alone, might naturally have referred to *eldest son*; but the subsequent words shew, that is impossible. This omission is unfortunately in the most material part of the deed: but whatever conjecture might be made how this happened, and however by the insertion of some words it might be made consistent, I cannot go out of the deed itself, but must take it as it now appears, and put the best legal construction I can upon it: and if it is capable of such a construction as will answer the end, and not run into the danger of a perpetuity, (which the law endeavours to avoid) that surely is the construction the court ought to follow. I am of opinion, that may be done in the present case. If in every event the trust of the term expired within lives in being, it comes within the compass allowed by law for its suspension; and the point of time is the death of the survivor of the father and mother, who are first provided for; on whose decease the trustees are then to assign to the eldest son, if then such in being; and to assign the whole term to him, not for life only; which might be liable to objection. Then the words "for want of such issue of such son" will prevent its going over to daughters on there having been a son, who died before leaving issue. If there is no son and no issue, the trustees are then only to assign to the daughters unfettered, and as an absolute interest. The words relate to the same time throughout, the death of the survivor of the father and mother: if the whole trust of the term should vest in the son on his birth, the intent of the settlement would be defeated; as if he died ever so young, his father would have his estate again as his representative; which in *Seymour* v. *Bingham*, 8 *June* 1744, (as it is cited) the *Lord Chancellor* declared against, as that would carry it to the representative of a son who

Perpetuity to be avoided.

So a father's taking as representative of a child dying young.

died

died ſoon after his birth, in order to throw it back to the father; which was to be avoided if poſſible. *Eldeſt ſon* in this deed muſt be reaſonably interpreted; they could not thereby mean *firſt born*, but *eldeſt* at the death of the ſurvivor of the father or mother; which muſt be the point of time fixed. The court always inclines to favour that conſtruction, which ſupports the limitation over, if it can be done; and has laid hold of all opportunities of referring it to a want of iſſue at time of the death: as where the words are *leaving no iſſue, &c.* the court has there in the conſtruction ſupplied the words *then living* to anſwer the intent, and ſupport the remainder over; for which *Atkinſon* v. *Hutchinſon*, 3 *Wil.* 258, and cited in *Sabberton* v. *Sabberton*, is very ſtrong. So *Donne* v. *Merreſield*, and *Forth* v. *Chapman*, 1 *Wil.* 663, where the deviſe over was on appeal held good. *Target* v. *Gaunt*, *Eq. Ab.* 193, and 1 *Wil.* 432, was on the words *dying without iſſue*. In the preſent caſe from the omiſſion, the words *ſuch iſſue of ſuch ſon* have no antecedent to which *ſuch iſſue* can be referred: then why ſhould I conſtrue that limitation over to depend on a general dying without iſſue at any time, when the deed does not ſay ſo; and this in order to defeat the iſſue of the marriage intended to be provided for? Indeed where the words are in general *dying without iſſue*, in conformity with the legal interpretation a dying without iſſue of the firſt tenant in tail according to *Buckmere*'s caſe 8 *Co.* 88 *a.* where it is held, it may be ſo laid in a *formedon*, I agree no intent of the party can be regarded, which is not conſiſtent with the rules of law. If therefore the words are plain, as in Miſs *Dormer*'s caſe, I could not depart from them; but as they are not plain, and to conſtrue it that it at death of father and mother there is no ſon, is more natural than to conſtrue it a failure of iſſue 100 years hence; that ought to prevail: though all thoſe caſes were on wills, this though on a deed is as ſtrong. *Maſſenburgh* v. *Aſh*, 1 *Ver.* It is objected for plaintiff, that the words at the end of the clauſe will ſerve to explain the meaning of the word *iſſue* in the former part, and would in caſe of a will or act executory raiſe an eſtate tail by implication, and conſequently carry the whole terme ſo it would, if on the death of the ſurvivor of the father and mother there was then *in eſſe* any perſon coming under the deſcription of the deed: but they cannot enlarge the former words, but muſt refer to there being no iſſue male or female, when the truſt was to expire, and the truſtees were to aſſign the whole term. Defendant's wife is therefore abſolutely intitled to it, and the bill muſt be diſmiſſed as to that part.

Limitation over, favoured.

Tal. 56.

Lord Beauclerc v. Miſs Dormer.

The ſame conſtruction on a deed and will.

Duke of Bridgwater *verſus* Egerton, *Jan.* 29, 1750-1. Caſe 49.

See a fuller note ſtate of this case in 1. Bro. Chs. Cas. 281. in a note there.

THE firſt queſtion was as to books claimed by plaintiff as heir-looms; for which was cited *Leviſon* v. *Grovenor*; which was a limitation for life, remainder to the firſt and every other ſon

Books not heir looms, but property of firſt taker tenant in tail.

ſon in tail male, remainder over; and then that his library ſhould go as far, as the law would permit, to the ſame perſons, to whom the eſtate limited. Tenant for life enjoyed till his death, and never had iſſue; the remainder over took place, and claimed the benefit of the library as an heir-loom. The queſtion was, whether this limitation over was not a right one? Another, whether, even if that was doubtful, the other words did not impower a court of equity to direct it ſo? Your *Lordſhip* held, in both caſes it would go. If on the firſt, that it was a double contingency: but a greater ſtreſs was laid on the other, that this was a legacy, which does not take effect without conſent of executor, who is a truſtee; and that the court would take care, it ſhould be ſo limited, to go as far as it would.

LORD CHANCELLOR.

Held the books ſhould not go as heir-looms to plaintiff, being the property of the late Duke *John*, his brother, tenant in tail, the firſt taker, and part of his perſonal eſtate. Here was no ſuch contingency as in *Leviſon* v. *Grovenor*; which had carried it as far, as can be, in the caſe of heir-looms.

Deviſe of houſe and appurtenants to wife during widowhood: but eldeſt ſon, when twenty-one or married, might on notice have it. She marries, the ſon under twenty-one; when twenty-one he will be intitled: the intervening intereſt undiſpoſed, and goes reſpectively to the reſidue.

Another queſtion as to a houſe, which with the appurtenances teſtator had deviſed to his wife during widowhood: but deſired, that when his eldeſt ſon for the time being ſhould attain twenty-one or marry, he ſhould, if he deſired it, and gave notice thereof, have the ſaid houſe and appurtenances for his own uſe, paying her 400*l. per Ann.* during widowhood. She had married again; but the preſent Duke had not attained twenty-one.

Scatterd on Contingent Rem. 432.

There was cited a caſe on the will of the Duke of *Buckingham*, *December* 4, 1745; where a houſe and appurtenances was deviſed to a wife during life on condition, if ſhe ſhould marry again, to go to the eldeſt ſon and his iſſue, remainders over. The plaintiff inſiſted, the houſe was freehold; the other ſide, that it was leaſehold, and to go to reſiduary legatee. Your *Lordſhip* held, that as the wife never married again, it was a contingent deviſe, which never happened, and therefore could not be taken by Duke *Edmond* by the words giving an eſtate tail, but it fell under the other general words of the reſidue; diſtinguiſhing it from all the caſes of contingencies.

LORD CHANCELLOR.

Undoubtedly teſtator had in view, that the event might be, that the eldeſt ſon for the time being might make this real eſtate during the intereſt of the wife; but it is clear, that he

intended, that after determination of her intereſt he ſhould have the houſe and appurtenances: if therefore the words in the will will anſwer any contingency, which may now happen, on which that deviſe may take place, it will have that effect. Her intereſt is determined, his is not yet come; but there is nothing to hinder it, being within the time the law allows a contingency; ſo that it may now happen; and that ſenſe will clearly anſwer that intent. Conſequently when plaintiff attains twenty-one, and complies with the circumſtance required, he will be intitled to have poſſeſſion thereof: the intervening intereſt in mean time is undiſpoſed of. He cannot have it; as not given to him. There being a diſpoſition of the reſidue both real and perſonal, ſo much, as is real, will go to the real according to Lord *Weymouth*'s caſe; ſo much as perſonal will fall into the perſonal, and go to the reſidue.

Another queſtion as to 5000*l.* a fourth ſhare of 20000*l.* provided to be raiſed by a truſt term in marriage-ſettlement in caſe of two or more younger children, ſubject to the father's appointment and diviſion between them. There were four younger children, three daughters and one ſon, the plaintiff. The father afterward makes another ſettlement, reciting that a proviſion had been made for the children of the marriage, and reciting his deſire and intent that the whole thereof ſhould be divided between thoſe daughters, he makes a ſettlement on the plaintiff in diſcharge and ſatisfaction of his proviſion, on condition that the plaintiff waved and releaſed it: but he thereby made no direct appointment or gift of that 5000*l.* to thoſe daughters. Afterward in his will he ſays, "*Item* I give "to my daughters ſo much, as, with what is provided by my "marriage-ſettlement, will make up their fortunes 10000*l.*" It is objected for the daughters, that by the marriage-ſettlement only 15000*l.* was provided for them; becauſe, taken ſtrictly, their brother was intitled to a fourth part of the 20000*l.*; and therefore they were intitled to have that 5000*l.* apiece made up 10000*l.* out of the perſonal eſtate, and over and above to take the 5000*l.* the plaintiff's ſhare, the benefit of which was purchaſed for them.

Portions for younger children under a ſettlement: father provides otherways for one; intending 10000*l.* apiece for the reſt. They are confined to that, and not alſo to claim an equivalent for the other's ſhare out of the proviſion made. Otherwiſe, if they had no other ſatisfaction.

LORD CHANCELLOR.

That is not the teſtator's intent. I am of opinion, that according to the father's plain intent in the laſt ſettlement and will, taken together, they are not intitled to more than to have their portions made up 10000*l.* apiece. The father could not make an illuſory appointment; becauſe that would be defeating the marriage-ſettlement, under which they took as purchaſers:

chaſers: but he might have made a very material difference between them; which power the court would not take from the father, provided he made a reaſonable proviſion according to the intent of the ſettlement. He intended, what ſhould be raiſed under that term, ſhould go to the daughters, who were properly to be provided for by money-portions, and to provide for the plaintiff in another manner. In his will he does not ſay *their portions*, but *fortunes*; which is their whole fortune in the world. He had not made a direct gift of the plaintiff's 5000 *l.* to them; but after he had put it in his power, he conſiders the whole 20000 *l.* as provided for them by the marriage-ſettlement; the whole right ariſing under that, he only exerciſing the power he had over it. If indeed theſe daughters had no other ſatisfaction whatever, and the plaintiff ſhould attain twenty-one, and being capable of electing ſhould ſay, he would not take that ſettlement on him, but abide by his ſhare, the 5000 *l.* and conſequently the limitations in that ſettlement had become void; if nothing more in the caſe, theſe daughters might have been intitled to have had the benefit of this limitation, made to the plaintiff, to re-imburſe to them the 5000 *l.* the father intended, agreeable to my decree on Lord *Coventry*'s will. But, having deſigned them 10000 *l.* apiece, if that equity tends to give them more, that would be a bar; for the court would not, that they ſhould take that equity contrary to the intent of the teſtator. If that would have been ſo, if the plaintiff ſhould make that election, it will be ſo now: conſequently they are intitled to no more out of the father's eſtate than to make up 10000 *l.*

Earl

Earl of CHESTERFIELD and others, Executors of JOHN SPENCER, *verſus* Sir ABRAHAM JANSSEN, *February* 4, 1750-1. Caſe 50.

S. C. 1. Atk. 301. & 1. Ves. S. 286.

Lord HARDWICKE, Lord Chancellor.
Sir WILLIAM LEE, Chief Juſtice.
Sir JOHN STRANGE, Maſter of Rolls.
Sir JOHN WILLES, Chief Juſtice.
BURNET, Juſtice.

Argued, trinity-term 1750.

THE ſtate of the caſe upon the pleadings and proofs, as far as was material for the conſideration of the court, was ſhortly this.

John Spencer in 1738, being poſſeſſed of an income of 7000 *l. per Ann.* and of a perſonal ſtate in plate, jewels, and furniture, to a great value, and having contracted a debt to the amount of 20000 *l.* to ſeveral perſons, moſtly tradeſmen, by whom he was preſſed, and which he was deſirous to pay off, propoſed to borrow money, and particularly a ſum of 5000 *l.* for that purpoſe. As he had a well grounded expectation of a great increaſe of fortune on the death of his grand-mother, the *Dutcheſs* of *Marlborough*, if he ſurvived her, he reſolved to contract thereon. He was above thirty; originally of an hale conſtitution, but impaired: and although afterward he lived more regular, yet he was addicted to ſeveral habits prejudicial to his health, which he could not leave off. She was ſeventy-eight; of a good conſtitution for her age; and careful of her health. He ſent to market a propoſal, which he ſuppoſed, would eaſily meet with a purchaſer; as it was natural to expect in common courſe, that his grandmother ſhould die firſt, though ſhe was a good old life, and he but a bad young one. This propoſal was, that if any one would lend him 5000 *l.* he would oblige himſelf to pay 10000 *l.* at or ſoon after the death of his grand-mother, if he ſurvived her, but to be totally loſt if ſhe ſurvived him: this

A. aged thirty, borrows 5000 *l.* on bond to pay 10000 *l.* if he ſurvives *B.* aged 78. *A.* ſurvives a year and eight months, having on death of *B.* confirmed the bargain by a new bond, *&c.* freely, and paying part: no relief, except as to the penalty.

was rejected by ſeveral knowing perſons as not ſufficiently advantageous; as it was at firſt by the defendant; but afterward accepted by him; and a bond of 20000*l.* conditioned to pay 10000*l.* was given on thoſe terms. She lived ſix years and three months; he ſurvived her one year and eight months. Upon her death, it did not clearly appear, who made the firſt application, whether the defendant for his money, or *John Spencer* for delay of payment, as he might not be able immediately to raiſe 10000*l.* although by the event he came to a great annual eſtate: but it was clear, that as ſoon it was propoſed by the defendant to *John Spencer*, he conſented to do it: and, near two months after the contingency happened, he executed a bond in the penalty of 20000*l.* conditioned for the abſolute payment of 10000*l.* at or before *April* following; and executed alſo a warrant of attorney for confeſſing judgment thereon; which was afterward entered. *John Spencer* in 1745, at different times paid two ſeveral ſums of 1000*l.* each in part of this debt; and expreſſed himſelf ſeveral times ſatisfied with the conduct of the defendant; and that he ſhould be paid his whole demand as ſoon as poſſible. The defendant after his death ſued a *ſcire facias* againſt his executors for an execution; who reſorted to this court, praying an injunction, and for relief on payment of the 5000*l.* with intereſt from the time of advancing it.

For plaintiffs. This caſe is of great importance to the eſtate of Mr. *Spencer*, but of greater to the publick. The bill is to be relieved againſt an exorbitant, unconſcientious demand, on the known terms in a court of equity, payment of principal really advanced and legal intereſt. There are three general points to be determined. Firſt, how that contract would have ſtood, if properly brought in judgment in a court of law, and conſidered merely upon legal principles? Next, what the fate of it ought to be in a much ſtronger degree in a court of equity, when examined by principles of equity? Laſtly, the ſubſequent tranſactions relied upon in the anſwer as a ratification of the original bargain?

As to the firſt, it is not good in point of law, and therefore uſurious. Oppreſſion of this kind is almoſt of as antient date as the uſe of money as a *medium* of trade; and uſury of a much more innocent nature was againſt the principles not only of the canon law, but of the common law of the land. Lord *Coke* ſays in 3 *Inſt.* 151, that a man being found guilty of uſury after his death, all his goods were forfeited to the crown; although it is now altered by ſeveral ſtatutes, which confine it to ſuch a *quantum*; allowing a certain, moderate profit

profit for the uſe of money: the difference therefore between uſury and intereſt is in *ſpecie* nothing, but in *gradu*. Though the ſeverity of the common law is changed, the nature of things cannot be changed; it was the conſtitution of this country, and is ſo, that no gain ſhould be exorbitant on the loan of money: and therefore it is immaterial whether it falls within the ſtatutes or no: but this caſe does; where ſuch a contract is originally for the loan of money, and exceeding the legal allowance, it is reſcinded by the act of parliament itſelf, though attended in ſome meaſure with a chance; being conſtrued a ſubterfuge and evaſion of the act; for if it may be extended to one life, it is difficult to tell where to ſtop. The legiſlature took a different method formerly; in the firſt acts deſcribing minutely what ſpecies ſhould be allowed; confining it to a direct loan of money for illegal gain, or ſale of goods or merchandiſe to perſons in neceſſity; the ſpecifying whereof introduced endeavours to evade the particular kind of uſury deſcribed: therefore the 21 *J.* 1. *c.* 17. is in general terms; in conſequence of which courts of law were veſted with a kind of equitable juriſdiction, to conſider the circumſtances of the caſe, ſtated as particularly as in bills in this court. The intent of the parties at the original communication is conſidered even by courts of law as deciſive; and where that is for a loan of money or colourable ſale of goods, whatever is thrown in of a different kind, it is uſurious, otherwiſe not. *Reynolds* v. *Clayton*, *Mo.* 397, and *Becher*'s caſe there cited. Next, wherever ſecurity is taken for a larger ſum, than is really advanced, it is uſurious; unleſs the party may deliver himſelf therefrom by paying a leſs, or by doing ſome collateral act. The throwing ſomething hazardous into the bargain, by which (as it is inſiſted) the lender might in ſome event have loſt the whole, will not take it out of the ſtatutes, and ſeems to have ariſen from the ſtatute 11 *H.* 7. *c.* 8, telling how far one might go to keep out of the act. *Mo.* 397. and *Button* v. *Downham*, *Cr. El.* 642. *Burton*'s caſe 5 *Co.* 69. *Roberts* v. *Tremain*, *Cr. J.* 507. *Cottrel* v. *Harrington*, *Brownlow* 180. *Fuller*'s caſe 4 *Leon.* 208. *Noy* 151. 2 *And.* 15. and *Maſon* v. *Abdy*, *Carth.* 67. 3 *Sal. Comberb.* 125. The only exception is the *fœnus nauticum*, or bottomry-bonds; which for the ſake of the publick, and benefit of trade are held not within the ſtatutes of uſury. The only view of the parties here was a loan of money, and ſecurity for double the ſum advanced, ſubject to the contingency; the borrower could not deliver himſelf from the payment; and the court will then lay every thing elſe out of the caſe. In the calculation of lives it is difficult to ſay, where the true rule is: *Halley* and *Newton* have varied: but on the firſt ſight one would think the lender had here greatly the advantage from the diſproportion;

proportion; ſo that on the face of it it would be deemed a ſubterfuge in a court of law. Suppoſe the bond exiſting; and an action brought by the defendant, after the grandmother's death; and the ſtatute of uſury pleaded; the parties may advance matters *dehors*; and it would be determined to be within the ſtatute; which is very extenſive, and, though penal, to have a liberal conſtruction. The terms, on which men communicate to borrow and lend, cannot alter the nature of the caſe. The *quantum* of the riſk is not material; nor did the tranſaction proceed on the compariſon of lives; or health or conſtitution; but if it did, the defendant was ſatisfied of the contrary to what he now endeavours to ſupport by proof, as to the conſtitution of Mr. *Spencer*.

As to the ſecond point: Courts of equity, not being tied up to rules, conſider queſtions of this kind in a more extenſive manner, and in general have avoided laying down any particular rule, as that would (like the old ſtatutes of uſury) teach perſons, how far they might ſafely go; but declare, that wherever there is a ſpark of oppreſſion, the motive on one ſide, neceſſity to apply for money, on the other a covetous paſſion for undue lucre, they always relieve; not indeed ſetting it aſide, but by giving what is really due. Their principles have been eſtabliſhed gradually and with deliberation: and if one or two judges, who preſided here, have differed and been unwilling, they have at laſt been compelled by the force of precedents and the growing evil. There were many caſes for relieving againſt unreaſonable bargains in caſe of young heirs in the time of Lord *Elleſmere*, *Bacon*, and *Coventry*. The firſt caſe afterward is *Waller* v. *Dalt* 1 *C. C.* 276; which was introductive of *Barny* v. *Beak* 2 *C. C.* 136. In *Berny* v. *Pitt*, 2 *Ver.* 14, Lord *Jefferies* held, there was no difference, whether it was for money or wares; that the firſt thing prohibited by the ſtatute is for the loan of money, and that of wares put ſecondarily only; and reverſed Lord *Nottingham*'s decree, who had not been long in this court, when he took that diſtinction. In *Berny* v. *Tiſon*, 2 *Vent.* 359, Lord *North* affirmed the decree, though he ſhewed an unwillingneſs, by adding *ne trahatur in exemplum*. In *Batty* v. *Lloyd*, 1 *Ver.* 141, Lord *North* diſmiſſed the bill. In *Nott* v. *Hill*, 1 *Ver.* 167, he would not relieve, and reverſed Lord *Nottingham*'s decree: but on a bill for ſpecifick performance of the ſame agreement, 1 *Ver.* 271, he ſeems a little to remit that rigour, he had at firſt, and would not countenance the practice. But Lord *Ardglaſſe* v. *Muſchamp*, where there was both a riſk and confirmation, ſhews, he had entirely got the better of it from the force of precedents. Other caſes were before Lord *Jefferies*, and Lords Commiſſioners, 1 *Ver.* 467, 2 *Ver.* 77, 78, 121, 402. So *Twiſleton* v. *Griffith*, 1 *Wil.* 310.

In *Curteyn* v. *Milner*, 3 *Wil.* 233, Lord *King*, though he ſeems like Lord *North* to have brought legal notions into this court at firſt, yet relieved. In *Lawley* v. *Hooper*, 10 *November* 1745, an annuity of 200*l.* was charged on the eſtate of an elder brother as a proviſion for the life of a younger, who, when in diſtreſs, granted 150*l.* part thereof to *Davenant* for 1050*l.* ſeven years purchaſe; with a proviſo that the vendor might re-purchaſe on notice, but there was indorſed, that it ſhould be on paying 75*l.* more than originally advanced: your *Lordſhip* held it a mortgage and redeemable; and that the 75*l.* more, when the thing was the worſe for the wear, made it unfair. The principle, on which the court has gone in theſe caſes, is an unconſcionable bargain, and it being contrary to publick convenience to encourage it. Such contracts are generally founded in oppreſſion by taking advantage of the borrower's neceſſity; which is the general ground of the malignancy of uſury: they are of publick miſchief by encouraging extravagance of young men. If ſtopping the progreſs of it, as a growing evil, be thought for the publick good, and no real inconvenience in laying an embargo on this ſort of trade, this is *nodus dignus vindice*. Theſe contracts are generally by perſons having an expectation only. Men thereby pledge their eſtates, before they have them, conſequently before they know the value. It is too true, that men generally have not ſo much regard to creating reverſionary inconveniences, when they conſult preſent gratifications; know not how to eſtimate what they never felt the benefit of, by which their eſtates, like their pleaſures, are gone before they enjoy them; and ſeveral poor creditors commonly fall with one of theſe prodigals. There is no remedy immediately by our law againſt this extravagance, as by the *Roman* law by *Curatores*, interdicting a man, not of underſtanding ſufficient to manage his own property, from the uſe thereof. This extravagance has eſtabliſhed a trade of annuities and *poſt obits*, univerſally exclaimed againſt. The ruin of a man, who falls into this method, is declared not to be far off: he ruins his eſtate without ſpending half; for a borrower on *poſt obits* never put it out to intereſt; and many of theſe are purchaſed at above half. Our ſons may at this moment be doing the ſame; and all, we have laboured for, may be gone juſt after our death. It is on the principle of publick utility, that courts of equity have gone further than the law. So from the general inconvenience, *præmiums* for places are not allowed; becauſe there the office falls to the man, not that he is fit for it, but the office fit for him. So in marriage brocage bonds, the firſt of which was *Hall* v. *Potter*, it is not for the ſake of the party ſeeking relief; or bonds to have ſo much a year out of a particular office; or by clients to agents pending ſuit, although the party, to whom it is given, appears meritorious; or by a young man juſt after twenty-one to his guardian. In

Sheply v. *Woodhouſe*, 17 *March* 1742. a bond by a man and woman to intermarry in 13 months after her father's death, and for a reaſonable ſettlement; the woman above 30, and living in her father's houſe; the court went on publick inconvenience, as tending to deceive and encourage diſobedience to parents. The caſes are not confined to young heirs; young remainder-men are as much the object: and the opinion of Lord *Cowper* and Lord *Talbot* was, that the relief of this court ſhould be extended to meet ſuch contracts; they are grown into a ſort of ſtated traffick, which tempts young men farther than their vices. Lord *King* indeed ſaid, if this was *res nova*, he might have had ſome difficulty; and it may not be eaſy to draw the line. If a young heir wanted to portion a daughter, or a ſum to put into trade, buy books, or for ſuch occaſions, equity might not interpoſe: but where it is to feed extravagance, the court will ſtop there. The ſame ſet of men are generally employed in ſuch contracts; and a catalogue of ſome of their fortunes is nothing but pieces of ruin out of ſeveral families. No proof of fraud or undue advantage is requiſite: the caſe ſpeaks for it: and otherwiſe it would be ſaying the court will not relieve at all, as to ſuch ſecret tranſactions witneſſes are not called in. It is unjuſt and unreaſonable, and in that light a court of equity calls it a fraud; ariſing from avarice on one ſide, and diſtreſs on the other; and will relieve on the ſame principles as in Sir *Thomas Meere*'s caſe, 1 *Ver.* 465. So by Lord *Talbot* in *Boſanquet* v. *Daſhwood* 40. That it was not ſought by the defendant, will make no difference; the propoſal generally coming from the perſon in diſtreſs. The defendant could not be ignorant of it, or of Mr. *Spencer*'s expectation and dependancy on his grandmother; his own witneſs, *Richard Backwell* ſaying it was hawked about, that Mr. *Spencer* wanted money on thoſe terms; and the neceſſity of concealing it from her made him a ſlave to the perſon, with whom he treated. It is literally true, that he was neither young, nor an heir: but he was not old enough to manage his affairs. *Twiſleton* was 34; yet was his contract relieved againſt. It is not generally in the caſe of heirs, though called contracts with young heirs; for an heir cannot ſell a reverſion: though he may eſtop himſelf by fine, he cannot grant. Mr. *Spencer* was *quaſi hæres*, expectant though not apparent: the Dutcheſs in *loco parentis*; and his dependancy on her from her conſtant declarations a parental dependancy; and known ſo to be by the defendant; who on that expectation built this contract. The contract itſelf as well as witneſſes prove his neceſſity. The bare applying to pay two for one has been held ſufficient. *Poor* and *rich* are relative terms: and however large a man's eſtate, if he cannot pay a debt, he is literally neceſſitous; and otherwiſe he never would have granted on *poſt obits*, or riſked his expectations on ſuch terms. Comparing the ages, the defendant cannot be ſaid to run any riſk: and the defendant has not ſhewn, that the contract moved on a compariſon of the

health of each: nor is there any certainty in judging on theſe caſes of lives.

As to the third point; all the other acts of Mr. *Spencer* were when under the like circumſtances as originally; proceeding from his inability to do more. His acquieſcence cannot be conſidered a ratification, but may be excuſed by his looking on it as a debt of honour and a ſort of wager. The bond and judgment is an evidence, he could not pay; he would go as far as poſſible; no money could be raiſed but by annual rents, whereas an immediate payment was to be made; and the borrower is a ſervant of the lender. Like *Curwyn* v. *Milner*, 19 *June* 1731. 3 *Will.* 293. and *Wiſeman* v. *Beak*, 2 *Ver.* 121. and Lord *Arglaſs* v. *Muſchamp*, where ſtronger inſtances of confirmation did not avail. So in ſome of the prize cauſes in *Exchequer* ſome repeated confirmations were held rather an aggravation. *Cole* v. *Martin*, 2 *Wil.* 290. differs materially from this; for there a perſon under no diſtreſs renounced a relief, he might have had.

Although the contract is uſurious in law, the proper way is to come into equity to ſtop this *ſpecies* of traffick, which is of publick inconvenience; no act of parliament could be made to meet this evil; nor any rule that would not be inconvenient in particular caſes. The policy of law and equity in this kingdom does nothing more, than what has been done in other ages and nations: as appears from the *Macedonian* decree; *Digeſt*, *lib.* 14. *tit.* 6. *Law* 1; *&c.* where though the words are *filiis familias*, it ſhall not be confined to that.

There ought therefore to be relief on payment of the real principal and intereſt.

For defendant. This is indeed a matter of importance; being a queſtion, whether a man's own act, without fraud, in full ſenſes, and having the abſolute diſpoſal, ſhall bind him? If (as has been argued) there was no other way, in which the court could aſſiſt the preſervation of families from ruin, it is better the law ſhould be wrong in itſelf; than uncertain. So far as a court of equity can prevent ſuch deſtruction by general rules, it will lay down ſuch rules: but will not endeavour to preſerve a weak or wicked man; nor ſay, that by the rules of equity an honeſt and wiſe man cannot be protected in his honeſty and wiſdom.

The queſtion of law muſt ariſe out of the fact; the particular queſtion of equity muſt depend on the fact alſo, conſidered under all its extenſive circumſtances, taking in the convenience and inconvenience: but ſtill the ground to go upon muſt be made out by evidence:

evidence: it will hereby be ſhewn, that this is a fair, honeſt, and honourable contract.

The circumſtances come under theſe heads. *1ſt*, The character, ſituation, and figure of life, of the obligor: *2d*, The ſame as to the obligee: *3d*, The motive or reaſonableneſs thereof, inducing the obligor to ſolicit ſuch a bargain: *4th*, The manner of tranſacting and concluding: *5th*, The fairneſs and equality of the price from the chance under all the circumſtances according to the probability at the time, and the event, that has happened: *6th*, The opinion the obligor always had of this.

As to the *1ſt*, It is material in all caſes. His underſtanding is not charged by the bill to be weak, or likely to be impoſed on, or that he was impoſed on. He was turned of thirty; no heir of any ſort, in which the term is applied in theſe ſubjects; for if one, living with his father, is conſidered as heir, (although *nemo hæres viventis*) he had no father, but was himſelf father of a family: he was in no ſtate of quarrel with any relations: known never to have gamed, which, it is proved, he hated: and he had taken up ſome former extravagances; and lived more temperately: was his own maſter; poſſeſſed of a fine family-ſeat with furniture ſuitable to his rank and figure; of 7500*l.* *per annum* for life, beſide preſent perſonal eſtate, contingent reverſions, and hopes from his grandmother. The preſſure on him for debts of 20,000*l.* (it appears not how contracted) was from tradeſmen. Juſtice obliged him to pay them; it would be ſcandalous not to do ſo; and prudence required it, leſt it might alter his grandmother's opinion of him. He muſt have paid this by the annual profits, joint or ſingle annuities for his life, or ſelling his perſonal eſtate, reverſion, or the chance he had from his grandmother; and this would probably have been the opinion of the beſt and wiſeſt friend, he had. None would advice the ſelling his perſonal eſtate, family-pictures, &c. which would be declaring himſelf bankrupt. The annual profits would not do it, nor would his creditors wait without impatience for it. As to annuities, the way taken by tenant for life who wants money for particular purpoſes, it certainly is not a beneficial way of contracting. It has appeared frequently, that if a man ſells an annuity for his own life, ſo that he wants to ſell it, the price is about ſeven years purchaſe, ſuppoſing him of middle age and in good health: if he was to buy an annuuity for his own life, the ſame man gives fourteen or fifteen, and in 1743. they went ſo far as to give ſixteen or ſeventeen, which is a great difference. If there is any objection to the life, they make him abate in proportion. Taking it in the common way, he could get but 7000*l.* for 1000*l.* *per annum*; taking in the objections to his life, perhaps not 5000*l.* If he was to ſell his reverſion in fee or the reverſion of 10,000*l.* (the intereſt of

which he had for life) if he had no younger children, he could have ſold them for little advantage: nor could he have got any thing for his chance under Lord *Sunderland*'s will. Then his only chance to raiſe money was this; and it was the moſt reaſonable way, if fairly done and on reaſonable terms: and otherwiſe his goods might be taken in execution, and ſold for little value, as generally happens.

Next for the circumſtances of the defendant; who is not charged in reſpect of his character, behaviour, or manner of dealing; as in ſecurities to women, their character muſt be charged and proved. It would have been material alſo, that he had been acquainted with Mr. *Spencer*, (the contrary of which is proved, as far as a negative can) or a companion in creating the debt and encouraging it. All circumſtances, weighing in other caſes, are clear of this. The defendant is not a perſon looking out for young men to prey upon; he did not think it a beneficial contract, and abſolutely refuſed it; but afterward accepted it on particular application and preſſing. Mr. *Spencer* himſelf in private fixed on what he thought the fair price, and does perſonally and by agents propoſe theſe terms to any, who would buy; which were refuſed by ſeveral only becauſe not advantageous.

The motive has been obſerved on already.

As to the manner; it is propoſed in the firſt moment as a conditional bargain. If it turned out againſt the defendant, there was certainty of a loſs; if for him, they might live ſo long, as that there would be a very improbable chance of gain. No undue advantage is taken; for what is propoſed, is ſimply accepted.

As to the equality of it as a bargain of chance; whoever deals in or buys lives, muſt have a regard particularly to the conſtitution of the perſon, manner of life and age. If the life is bad, the company will not inſure at all: all circumſtances muſt be conſidered, and it is enough to go on probable opinion. The bargain ſuppoſes an inequality in their lives, that the grandmother was moſt likely to die firſt: ſhe was of good health, and took care of it; Mr. *Spencer* the contrary, from his courſe of life. The inſurance-offices always go on opinion, and inquire into a general account; ſo that if a falſe account is given in, actions are frequent in *Guildhall* for the fraud. It is proved, that notwithſtanding advice he would not alter his courſe, and ſaid, he did not deſire to live longer, than his conſtitution would let him. In all theſe chances, if a man has gone through ſuch ſhocks to his conſtitution, as he did, they deduct two years purchaſe. It was the opinion at that time, that he was a bad life; and it appears negatively, that it could not be inſured at 5*l. per cent.* taking it on the event, ſhe lived ſix years after; he ſur-

vived her but twenty months. Suppoſing his life was inſured at 5*l. per cent.* which is the inſurance in caſe of a perſon in the beſt health, on a computation of the value of lives and terms for years the defendant is a gainer about 300*l.* and might have abſolutely loſt it, if ſhe had lived many months longer. Intereſt of the intereſt, which would then be loſt, muſt be made in all computations. It is ſo as to the burdens to be borne between tenant for life and reverſioner, which is rather too favourable to the tenant for life. The defendant has proved, that none would give that, or ſo much as he did: the plaintiffs have proved nothing of that, which would have been material to ſhew the value of the contract: the diſproportion then of the riſk will not make it a bad contract: nor does this court conſider bargains in the nice ſcale of exact Equality; not adopting the rule of the *Roman* law, by which, if a bargain was one half under value, it was ſet aſide.

Laſtly, his ſubſequent acts, as paying part, writing the letter himſelf to confeſs judgment, and taking every ſtep after her death to carry it into execution, would not perhaps be of ſo much weight, if they were not conſiſtent with his private opinion: his declarations in private being that he was honourably and fairly dealt by. The judgment was given freely, and not complained of afterward: ſo that if it could have been ſet aſide originally, it cannot now; and being in his ſenſes, he might have releaſed any demand. A releaſe in terms of all his right to ſet it aſide would have operated in point of law. Then is it not ſo in equity? A releaſe indeed may, like any other contract, be ſet aſide in this court: but that muſt be on new impoſition in obtaining the judgment. Things did not remain in the ſame ſituation; for now the money became abſolutely due; nor was he under the ſame neceſſity; and might have diſputed it then. In *Cole* v. *Gibbons*, 3 *Will.* 290. the contract had not a poſſibility of being fair: yet there was no relief, becauſe it was confirmed with open eyes. In *Standard* v. *Metcalf*, *Nov.* 1734. the plaintiff lived with the defendant, her uncle, and ſoon after coming of age was prevailed on by him to ſettle her eſtate upon herſelf for life, remainder to her iſſue in tail, remainder to her uncle and his heirs: ſhe afterward became a lunatick; the tranſaction was thought on the face of it to be hard and an impoſition by the uncle, acting as guardian, there being no conſideration, nor any occaſion for it, not being for marriage: on a bill to ſet it aſide the defendant inſiſted, it was fair, and that after the ſettlement ſhe by will, to which he was not privy, had given the eſtate in the ſame way. Lord *Talbot* thought it an extraordinary contract and unfair, though no proof of fraud, and ſaid, if it depended on the ſettlement only, he ſhould have relieved, but the will had confirmed it, which took off that ground to ſet it aſide: on appeal it was affirmed with this variation only, that as the bill was by the committee, it

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ought not to bind the lunatick, but ſhould be without prejudice to her, if ſhe ſhould become *ſane*, and ſeek to ſet it aſide. The will did not operate there, but only ſhewed a confirmation: ſo, but in a ſtronger degree, does the ſubſequent act here.

As to the uſe in fact to which this money was applied, it is not material to the defendant to ſhew that; having advanced it *bona fide*: but what materially diſtinguiſhes this from other caſes, is, that it was applied to the payment of the borrower's tradeſmen.

To conſider next the queſtion of law: whether this contract, as it ſtood originally upon the bond, is void at law? if ſo, it is indeed putting it on a clear foundation: mankind will have a rule for their property, and know the conſtruction of the ſtatute; and it will be needleſs to argue as to the conſequences in this court, for one cannot with his eyes open make an agreement contrary to that ſtatute. As a bargain for a contingency there is no objection; for all ſorts of contingencies are the ſubject of a legal contract. Any objection then to this muſt be on the ſtatutes of uſury; which is not frequent in a court of equity. No contract is a contract on uſury within the ſtatutes, which was not ſo before them. By the common, taken from the canon law, a notion long prevailed, that it was not lawful to take any intereſt for the uſe of money, which prevails in *Roman* catholick countries to this day; and it is aſtoniſhing, how they ſhould think, money might not be a commodity to be uſed as well as any other. This notion kept that commerce out of the world. In *France* they let out money to intereſt in another ſhape. Lord *Coke* in 3 *Inſt.* labours hard to ſhew, that taking any intereſt is contrary to nature, and endeavours to prove it alſo contrary to the law of *Moſes:* but the age is grown wiſer, and the law is altered. Any ſort of *præmium* was uſury; now an illegal *præmium* only. *Præmium* is a word more extenſive than *intereſt*; and *uſury* is, taking a higher *præmium* than the law allows for the uſe of money. The ſtatute of *H.* 8. is an act againſt uſury; fixing the rate of it; which has been followed by the legiſlature until 12 *Ann.* and the rate of intereſt varied; and the ſenſe of all the ſtatutes may be taken together. Perhaps it may be a doubt, whether it is for the publick good to have any law fixing the rate of intereſt, or that it ſhould be like other commodities at market: *Lock*'s treatiſe upon the conſideration of reduction will at leaſt make that doubtful. But it muſt be taken on the ſtatutes, which comprehend only contracts on uſury. There muſt be a principal ſum due, and a rate of hire for the uſe: if it exceeds the proportion fixed, the ſecurity is void; and no artificial contrivance ſhall evade that law: therefore on pleading the ſtatute of uſury it may be proved by any collateral evidence, where it appears not on the face of the contract. Where there is no principal and rate of forbearance, the ſtatute

tute relates not to it. At common law therefore, when uſury in general was forbid, a contract on condition or peradventure was not within it. *Hawkins C.* 82. never diſputed as to this point; where the principal may be hazarded really, it cannot be uſury. Contracts on *bottomry* are not excepted out of the ſtatute: yet are clearly not within it from the nature of the contract, the contingency of the ſhip's returning. So the diſcounting notes or bills of exchange is not within the ſtatute; no principal being due which is forborne. So the buying up ſecurities at a lower rate on the eſtate of a third perſon, of which more than the legal intereſt may be made, is not within the ſtatute: ſo a wager at odds; which is *Button* v. *Downham*: ſo of a caſual bargain; *Beding field* v. *Aſhley*: ſo *Fountayne* v. *Grimes*, and *Long* v. *Wharton*. Inſurance intereſt or no intereſt, is barely a wager, and not within it; according to *Dodaridge* J. in *Roberts* v. *Tremain*, and *Sharply* v. *Hurrel*, *Cr. J.* 209. Yet none of theſe caſes but may be turned into ſuch a ſhift as to be brought within the ſtatute, if that is the truth of the agreement; as in *Bottomry*, if it be a mere evaſion and no riſk. Where the principal is ſecured, no contrivance can exceed the rate of intereſt; which being forbid abſolutely, is forbid on contingency. The caſes cited for plaintiffs prove only, that where it is but a nominal riſk, it is a mere ſhift and evaſion; as in *Clayton*'s, *&c.* where the demurrer admitted the corrupt agreement, and there was no objection to the pleading. A ſtreſs is endeavoured to be laid on words in determining a queſtion of property, from the word *loan*, *&c.* made uſe of in this caſe. If it is a loan within the ſtatute of uſury, it is material; but a contract on uſury is not a loan in its nature; a loan being that which is gratuitous. It is true, there is a difference between a loan not conſumed by uſing, and a loan which is conſumed. The firſt, as of a horſe, is called *commodatum*; for lending is not underſtood to be letting it, if not conſumed: the other is to be repaid in weight and meaſure, and is called *mutuum*: but in its original was gratuitous. But the court always goes to the ſubſtance. What is a loan in its nature, cannot be made a purchaſe by calling it ſo: nor *e contra*. This never was propoſed in the nature of uſury; the original communication being for this contingent bargain: no principal was due, nor rate for forbearance; which there cannot be from the nature of the contract. In *bottomry* it is called a loan: but not therefore uſurious: and there is no difference between this and *bottomry*; which is admitted to be a hazardous contract and good; not becauſe it is for benefit of trade, but that a material riſk is run, and to be paid for it. So that it turns on this, whether it is a fictitious, colourable, contingency to evade the ſtatute; for if ſo, it is void; otherwiſe not. If no bargain can be made of a contingency on a life, but what is within the ſtatute of uſury, it will be a propoſition underſtood by every one.

Suppoſe an action brought, and a plea put in; this could not be conſidered as a nominal contingency and to evade the ſtatute.

Next, whether this court can ſet aſide this legal contract upon arguments of conſcience ariſing out of the caſe, and that in the utmoſt latitude? The proper juriſdiction of equity is indeed to take every one's act according to conſcience, and not ſuffer undue advantage to be taken of the ſtrict forms of poſitive rules. As this is only a ground of equity, it may indeed be made out by any ſort of evidence upon all the circumſtances; and on all together the court cannot ſay, the defendant is guilty of miſbehaviour, (which is not charged or ſuggeſted) or ſay, this ought not to ſtand. Here is no fraud or over-reaching, no evidence, from whence impoſition is to be preſumed; and the amount of the caſes cited for plaintiffs is, that the court will relieve againſt fraud in this as in other caſes.

But ſuppoſing theſe points againſt the plaintiffs, another, and a very general queſtion has been made of the firſt impreſſion; *viz.* Suppoſing the tranſaction good in law and conſcience, yet this court ſhould, for the ſake of making a rule, ſet it aſide on principles of policy or political reaſoning; for on fraud there can be no caſe in which this court will not relieve. No political principle can be ſtated on which it ſhould be ſet aſide; therefore ſuch a ground of determination is impoſſible in this court. There may be a difficulty to tell what ſort of rule. It is admitted, that no certain one can be drawn, becauſe it would be dangerous, when applied to particular caſes; and it is therefore ſaid, acts of parliament cannot be made to meet caſes of this kind. This court does not exerciſe or aſſume a legiſlative power, but diſclaims it; and never will make a law to ſet aſide contracts on public principles out of that cauſe, if good in law and conſcience, let the convenience or inconvenience be what it will. The contracts in *Exchange Alley* were all contingencies: yet it was neceſſary to have an act to ſet them aſide, although eaſily proved inconvenient to the public. So of fair and equal wagers; an act of parliament 7 *Anne* was forced to interpoſe. So of gaming; money won at fair hazard, without cheating, this court never ſet it aſide before the legiſlature interpoſed. So that political arguments are never taken into conſideration. The contracts of ſailors, ſelling their ſhares before they knew what they were, could not be ſet aſide here. It is true, there cannot be a more wretched condition than to have the rule of property uncertain: *miſera ſervitus ubi jus vagum.* Lord *Digby* ſays, "ſet the mark on the door of the houſe, and let "me know that it is wrong, or it is doing it *ex poſt facto.*" Where the court has gone upon public convenience, it has been in caſes defined and aſcertained, which, it is admitted, this cannot be. It is a misfortune, that accounts of courts of equity are conveyed to the publick in looſe notes by perſons not concerned in the cauſe, and

miſtaken, and that general rules are drawn from particular premiſſes. The court, in all the caſes alluded to have inferred a preſumption; but in all, the preſumption may be taken off: it depends on the evidence. If a truſtee buys the eſtate himſelf, the evidence from his ſituation is ſufficient; he has miſbehaved; for he cannot be a check on himſelf, and does not act fairly; but the preſumption may be taken off: as if he agrees openly and fairly with *ceſtuy que truſt*, or with the knowledge of this court. So in bonds to lewd women, getting ſecurities for nothing; ſhe has groſly miſbehaved; and the common preſumption is, that ſhe has taken an advantage: but that may be taken off. So in marriage brocage bonds, the defendant there has laid ſuch a bias upon himſelf, that he cannot properly adviſe; has a power and diſtreſs over the party: this is evidence, unleſs taken off. So in a private bargain to give back part of the marriage portion, contrary to the publick treaty, it is fraudulent, and a preſumption ariſes of undue advantage; becauſe the father may ſay, he will not otherwiſe agree: but that may be taken off. Bargains for money, under which offices are procured from one who had the giving or recommending, have nothing to do with this: but there the preſumption from the miſbehaviour, as the man cannot get the office without it, may be taken off; as where ſold with the King's leave; as commiſſions in the army; or a ſum of money may be paid out of the truſt of an office, as in Mr. *Bellamy*'s caſe. Another inſtance is, the ſetting aſide ſecurities to attornies pending the buſineſs; which was *Walmſley* v. *Booth*, 2 *May* 1741. where *Japhet Crook* being proſecuted for forgery, employed the defendant to be his attorney, who was to get bail, money, and probably even evidence for him, and juſt then procured him to enter into a bond for 1000*l.* for which there was no conſideration, but for ſervices done: this a court of juſtice would never ſuffer; but has relieved on principles of a general nature, that an attorney ſhould not take advantage of his client's diſtreſs to get from him what he ought not; this court, and a court of law, will, without ſhewing errors, tax an attorney's bill, though ſettled by the party himſelf, unleſs a great acquieſcence or ſome ſuch matter: it was an unreaſonable bargain; and the preſumption was from his not being at liberty: but it has never been determined as a rule, that a *bona fide* attorney may not receive a gratuity over and above pending the matter. Another rule inſiſted on is, that mutual bonds to marry ſhall be ſet aſide by the court, though ever ſo fair: yet in *Atkins* v. *Farr*,* *Feb.* 1738, your Lordſhip decreed relief on ſuch a bond. That rule was taken from *Woodhouſe* v. *Shepley*; but your Lordſhip there ſaid, you gave no opinion what would be the caſe, if the bond was entered into by two perſons *ſui juris*, without fathers, or emancipated, having fathers. The ground there was not, that the woman did not know of the bond (which ſhe certainly did) ſhe lived in her father's houſe, had nothing but from him: they met at night out of the houſe, and executed this bond; it was held a fraud and impoſition on the father, who was made to believe the match

* Atkyns's Reports 287.

was

was off: it was ſeducing her from his houſe, and encouraging her in diſobedience; therefore though ſhe knew what ſhe did, the court relieved. Laſtly as to the caſe of *poſt obits:* it is ſaid, where ſons, whether in remainder or otherwiſe, or *filius familias*, not having a fortune or emancipation of their own, are encouraged in riot and expence, the court relieves without evidence, from the particular purpoſe becauſe no ſon in the life of his father ſhall make ſuch a bargain: but that is not the ground of relief; for that may be denied like all other preſumptions: from the reaſon of the thing it is the miſbehaviour to perſons under this deſcription, to ſhare in riot and encourage diſobedience; which appears from *Domat* under the general title *Loan*; and in another place he ſays, that, on a bargain with *filius familias*, under ſuch circumſtances there may be relief, under ſuch not; not ſaying but that a ſon might, for a portion, even where *filius familias*, do it. As to which an obſervation ariſes on the caſe determined by Lord *Nottingham*, who relieved againſt many of theſe contracts on particular evidence. Lord *North* thought he went too far: Lord *Jefferies*, that he did not go far enough: which is not to be wondered at; for, judging upon circumſtantial evidence, they might draw different concluſions. Lord *Nottingham*'s reaſons in his manuſcript ſhew, he did not think he was going on the general rule, that a ſon could not ſell a contingency. The caſe is intitled *Berney* v. *Fairclough* and others, 32 *C.* 2. *Berney* was drawn into ſeveral ſecurities for money to be paid after his father's death, who then was infirm and kept alive by art; by ſome he was to pay five for one, and was thus involved in debts to 50, or 60,000*l.* in all which he appeared to be circumvented and beſet; moſt of the money pretended to be borrowed, being raiſed by delivery of wares at an exceſſive price, as wine, hemp, *&c.* which could not be ſold for a quarter of the price; but the plaintiff from his neceſſity (his creditors being underhand procured to fall upon him) was willing to get money on terms, againſt which he ſought relief. Lord *Nottingham* firſt made him pay the principal borrowed, before he would give an injunction; but relieved him as to the reſt at the hearing; becauſe, he ſaid, this infamous dealing ought to be ſuppreſſed; that the *Star Chamber* uſed to puniſh, and this court ought to do it; and that no family could be ſafe, if this was ſuffered. But *Pit* prevailed; and the bill againſt him was diſmiſſed, though he gained about three for one; for it was in the time of his father's health, three years before his death, without any circumvention or practice, upon an expreſs agreement to loſe the principal if the ſon died in his father's life; which ſhews the ground of the determination; relieving againſt thoſe defendants guilty of miſbehaviour, yet thinking that a proper bargain might be made by the heir. Lord *Jefferies* on the evidence of that caſe, when before him, laid a different ſtreſs, and relieved againſt *Pit* alſo. From that time there is no caſe until *Twiſleton* v. *Griffith*, which turned on the particular fraud and circumvention. *Curwin* v. *Milner*,

ner, as cited, is a determination againſt Lord *King*'s opinion: that he thought himſelf tied down by precedents, but, if it had been intire, he might be of a different opinion: and in the note in 3 *Wil.* it is miſtated, *and* inſtead of *or*. It is going a great way to ſay, there can be no caſe, where a ſon could ſell a reverſion, where the preſumption is taken off. Preſumption is evidence, but until the contrary proved. This is not the caſe of a ſon; but of one, maſter of his own property. *Cujus dare, ejus diſponere.* The principle is too large, that this is to be ſet aſide becauſe of a want of money on one ſide; that holding in every bargain; then as to the proſpect of gain on the other, it is a laudable motive, provided they act honeſtly. He was under no more neceſſity, than any man may be preſumed to be, who ſells his eſtate, and cannot therefore come into equity to ſet it aſide, becauſe he wanted money to pay debts, and would not otherwiſe have ſold it. The ground of common recoveries is to enable people to diſcharge debts by ſale of eſtates. If it is to be ſet aſide, as being an expectation from a grandmother, the court muſt go into very minute circumſtances. As to the court's relieving upon general principles againſt annuities for life of the ſeller, the court never laid it down, that ſuch annuities ſimply were paid. *Lawley* v. *Hooper* was on particular grounds; the plaintiff was in gaol at the time; and fraud infecting the whole: but the court did not ſay, no annuity ſhall be allowed, that a man ſells for his own life; if ſo, there is an end of all inſurances on lives. The reaſoning in *Batty* v. *Lloyd*, 1 *Ver.* 141. was never contradicted. There would be great difficulty, was one not allowed to ſell ſuch things and turn into money, but muſt ſtarve *ob hæredis cauſam.* Contracts for contingencies have been admitted; *Beckley* v. *Newland*, 2 *Wil.* 182. and in *Hobſon* v. *Trevor*, 2 *Wil.* 191. a contract for ſale of an expectancy was even carried into execution. In *Whitfield* v. *Fauſſet*, 1750, a mere poſſibility was ſold by the heir, nothing veſting in life of the father and mother; and yet your Lordſhip decreed a further aſſurance by the heir; which, if an illegal contract, would not have been done. So where an officer, going abroad, aſſigned his future pay, a bill was brought to ſtop the money in his agent's hands: it was argued, ſuch aſſignments were not to be endured, becauſe uncertain and againſt the publick ſervice, and ſhould be diſcouraged, as ſpending one's eſtate before he has it; yet the court thought every one might diſpoſe of his property; and decreed it becauſe not unconſcionable, though that was a contingency and poſſibility; equity going further than the law, which allows as contracts, but equity as conveyances. But what is this publick good, which is not to be defined? Is the end propoſed by this, that none ſhall ſpend above his annual income? That is not to be ſecured in human nature or prevented. Though the *Romans* had that law, they were allowed to ſpend their eſtates. Is property to be locked up to another generation? for that effect it will have; which is contrary to the principles

of the conſtitution of the legal part of the government; the later books for perhaps 200 years giving a reaſon why the ſtatute *de donis* is not to be kept and preſerved, that mankind may apply their property to pay their debts; and judges have ſaid, there is great inconvenience in people's not being able to ſell their own eſtates. Is the end propoſed, that a man may raiſe money on eaſier terms if this is ſet aſide? The conſequence would be directly contrary. If one wants money, and a difficulty is laid upon contracting with fair, honeſt men, he will go into the hands of knaves, who will make him pay for running the riſk of the law, and inſiſt on more, when it is ununderſtood, that he could not make a contingent bargain. This was not lent to feed riot, but to get rid of a preſſure, which is a reaſonable cauſe, and therefore no ground to ſet it aſide on political motives. As the law cannot find out a general rule to proceed on, much leſs will this court; and in every caſe, where equity cannot relieve, it is not fit to be relieved.

February 4, 1750-1, the court delivered their opinion. *Abſente Willes*, C. J.

Burnett, J.

Upon the ſtate of this caſe, three points are made. 1ſt, That the original contract is uſurious, contrary to the ſtatutes, as being a greater *premium* than the law allowed; and if ſo, the new ſecurity will fall to the ground as well as the contract itſelf. Next, that if not uſurious, it is ſo unreaſonable an advantage taken of neceſſity and future expectancy, as the court is warranted to relieve againſt as an unconſcionable bargain. 3d, That if the court is warranted to relieve againſt this, the new ſecurity will be conſidered as a continuance of the ſame oppreſſion, and ſtand in the ſame light, though entered into after the event.

The other ſide inſiſt, that the original contract is a mere contingent bargain, and conſequently not within either the intent or words of any ſtatute: there are no circumſtances of a deſtitute heir or perſon ſeduced from parental government; no practice, fraud, or ſurprize: and that the bargain is equal taking into conſideration the riſk run of the principal; and therefore the court is not warranted to relieve even on the foot of the original bargain. But ſuppoſing the court would relieve on that, yet there is no precedent (but to the contrary) of relief when the party has taken on himſelf to be a judge of the equity of the contract, and confirms it with his eyes open.

The caſe is new: and I ſhall endeavour to throw my thoughts into one connected light, and occaſionally take in all the caſes cited.

This contract not within the ſtatute of uſury.

Where contracts are uſurious or not.

As to the 1ſt point, whether the loan of 5000*l.* to be paid 10,000*l.* on the death of the Ducheſs if he ſurvived her, but nothing if he died before her, is uſurious, or a mere caſual, contingent bargain? I hope, I may be excuſed in calling it a loan; becauſe, although in a caſe, where the capital is not in all events to be paid, the word may be improper in courts of law, this court at leaſt has adopted the uſe of that word in reſpect of a mere contingent bargain, that of *Bottomry*. If this contract be uſurious, it muſt be either becauſe it is contrary to expreſs words of the ſtatute, or an evaſion out of it. It would be miſpending the time of the court to enter into the old notion about uſury, and the condemnation of it by canoniſts, civilians, and ſome common lawyers; becauſe all thoſe expreſſions depend on a principle, which is out of the preſent caſe. The common lawyers differ; there being great opinions either way. Lord *Coke* ſeems to call all uſury unlawful. 2 *Inſt.* 89. 3 *Inſt.* 151. but in *Hard.* 420, Lord *Hale* ſays, the *Jewiſh* uſury only is prohibited by the common law: and the true ſpirit of uſury lies in taking an unjuſt and unreaſonable advantage of their fellow-creatures. But it muſt be agreed, that nothing is legally uſurious, that is not prohibited by the *St.* 37 *H.* 8. 9. which leading ſtatute is followed by the reſt; the 12 *Anne* 16. varying from it only in reducing the legal intereſt: the caſes determined on the firſt ſtatute have been therefore always looked on as authorities on any of the ſubſequent. Therefore to

Uſury, where the reward is for forbearance.

make a contract uſurious within the expreſs words of the ſtatute, the reward muſt be taken for forbearance or giving a day of payment; and, whatever ſhift is uſed, it will be uſury: but not within the ſtatute where it is otherwiſe. If in truth it was a ſum advanced by way of loan, and the reward in truth given for forbearance, no ſhift will prevail. I ſhall better explain myſelf by the inſtances I ſhall put. Suppoſing there is a purchaſe of an annuity at ever ſuch an under price, if the bargain really was for an annuity, it cannot be uſury: but if the communication was about borrowing and lending, it may be uſury within the ſtatute: and how? If by reaſon of all the circumſtances, and of the communication, the exility of the ſum given, the original contract being a borrowing and lending, the court thinks the annuity was a mere device to pay the principal with uſu-

Or device to evade the ſtatute, or colourable contingency.

rious intereſt to evade the ſtatute, this will be within the ſtatute; though on the face of the bargain it appears ever ſo fair a ſale of an annuity: the contrivance of the annuity, as the uſurious reward for the loan of money, ſhall not evade the ſtatute made for the benefit of mankind. This I take to be the ſum and ſubſtance to be collected out of the ſeveral caſes. *Cr. E.* 27. 4 *Leo.* 208. *Noy* 151. 1 *Brow.* 180. and 2 *Lev.* 7. So a bargain on a mere contingency,

Not where the reward is given for the riſk.

where the reward is given for the riſk not for forbearance, will not be within the ſtatute: but otherwiſe if the intent was to have a ſhift; which was *Cr. E.* 642, 3. If therefore a man gives or lends money, not to be paid if the event ſhould be one way, but double if the other,

and it is uncertain which way it will happen, it is not within the ſtatute; for the reward is given for the riſk, not forbearance: but if under colour of ſuch an hazardous bargain the real treaty is for a loan, with an uſurious reward for that loan, and to evade the ſtatute, the contingency inſerted is of little moment, being no ingredient between the parties: the court or a jury on the whole may pronounce ſuch a contract uſurious, notwithſtanding that colour of contingency, if they are ſatisfied, the reward is given for forbearance, not for the riſk; as in the adding a ſingle life, which is a healthy life, if that life ſhould ſurvive half a year: ſo they might as well add a contingency, if any one of ſix perſons was alive at the end of ſix months; and one of the caſes is, if any one of three perſons is alive at that time. The intent of the bargain is the material thing: if that was borrowing the money, it is within the ſtatute, whatever colourable contingency inſerted: and this is the ſenſe of all the reſolutions in the ſeveral caſes. 5 *Co.* 69, 70. 2 *And.* 15. *Mo.* 397. And *Maſon* v. *Abdy*. But where the principal was fairly and truly put in hazard, and ſuch as none would run for the intereſt the law allows, there is no caſe where it has been held within the ſtatute. The ſlightneſs or reality of the riſk ſeems to be the only rule directing the judgment of the court. *Cr. E.* 741. *Bedingfield* v. *Aſhley*; and in 3 *Keb.* 304. *Long* v. *Wharton*, which, though inaccurately reported, ſeems to me good law. I cannot ſee two contracts bearing a greater ſimilitude than this and *Bottomry*. A life may be inſured: ſo may a ſhip, which may ſink the day after: ſo may the party die: one is as much an adventure as the other. It was endeavoured to diſtinguiſh *Bottomry* from every other contract upon this, that though above what the law allows upon a loan, yet *Bottomry* contracts were eſtabliſhed in favour of trade, there being a riſk of the principal, and they being neceſſary for trade and commerce. But whatever favour the court may ſhew to ſuch contracts, they will never eſtabliſh them upon the deſtruction of a ſtatute; and the principle of the court thereon was, that the *Bottomry* bond was not within the ſtatute; nor could it be; for it is plain, that a real riſk was run, that the principal may never be payable; therefore it cannot be given for forbearance, but grounded merely on the contingency, the riſk. But as a colourable contingency in caſe of a life annexed to the payment may make that bond uſurious, ſo will a colourable contingency annexed to a *Bottomry* contract: as in a bond, if one out of twenty ſhips, bound from *Newcaſtle* to *London*, arrived ſafe; that would be a contingency thrown in to evade the ſtatute, which would be too hard for ſuch a bond: ſo if ſuch a contract is made, if the pacquet ſhould return to *Dover* from *Calais* at a ſeaſon of the year in which there is no danger: and this I may ſay with the more ſecurity, as *Joy* v. *Kent*, *Hard.* 418. is an expreſs proof of it; where a *Bottomry* bond was ſent to be tried, whether it was an evaſion of the ſtatute; which would not have been ſo, if it could not have been an evaſion. Indeed

Bottomry not within the ſtatute of uſury, becauſe a real riſk is run.

deed Lord *Hale* throws out expreſſions very favourable to trade, but ſo inaccurate in that book, that I do not think they could be ſuch as came out of the mouth of ſo great a man. His *dictums* then are of no authority. One of the firſt caſes of *Bottomry*, which came in queſtion, was *Sharpley* v. *Hurrel*, *Cr. J.* 208. What the court goes on there, is the real riſk of receiving leſs; which is cited again in *Roberts* v. *Trenayn*, 2 *Roll.* 47, and *Cr. J.* 508. which differed from the other. In *Soome* v. *Gleen*, as in 1 *Sid.* 27. the reſolution is founded on the real hazard of the principal, which cannot be within the ſtatute. On the whole therefore I am of opinion, that this is not a contract founded in its origin upon uſury, but a contingent bargain, and conſequently within the expreſs words or intent of none of the ſtatutes of uſury.

Whether to be ſet aſide in equity as an unconſcionable bargain.

The next point is, ſuppoſing it not a contract within the ſtatute, whether it is not ſuch an unconſcionable bargain obtained on an expectant upon his expectancy, as the court is warranted on precedents to relieve on paying the ſum advanced with intereſt from the time of advancing? If it was neceſſary to give an opinion upon this, I own I ſhould have great difficulty. On one hand I ſhould apprehend, it would be too large to ſay, in no caſe an heir or expectant could borrow money on his expectancy; and yet to let him borrow without any advantage to the lender ſeems to put him under difficulties; fathers being frequently cloſe-handed, though liberal enough at their death: ſo that an heir, if hindered from ſupporting himſelf by theſe means, might ſtarve in the deſart within view of the land of *Canaan*. On the other hand, I ſhould dread the conſequence of giving the ſanction of this court to future bargains. Lord *Cowper* ſtates the inconveniences of a ſanction, which had been given. I am ſure, it is a point of that conſequence to the welfare of mankind, that without neceſſity no court will give an opinion, of which an ill uſe may be made. For the plaintiff it is inſiſted, that there have been many contracts, not illegal or iniquitous in ſome circumſtances, but from the univerſal ill tendency on the prejudice to the publick have been always ſet aſide in this court; inſtances of which were in marriage-brocage bonds, and other contracts of like nature; and that the ill tendency of heirs contracting with ſtrangers to furniſh their wants, is to make them quit a regular family life and dependency, to withdraw from advice and counſel of friends, and to have youth ſupplied with the means of gratifying their paſſions, and the bringing people together on the worſt principles, on which men may contract, avarice on one ſide, and a craving appetite on the other. The greedineſs of gain is the only principle on which a ſtranger can be induced to furniſh a ſtranger; and the occaſion of applying to a ſtrangr is, becauſe the wants are ſuch, as he would not reveal to his family; which tends to a deluſion in what is of general concern, the proviſion for poſterity. A man may be giving his eſtate

to a money-lender inſtead of the perſon intended: and every diſguiſing the truth from a man, who has a right to the truth, is wrong, and ought not to be encouraged; and by this deluſion he gives his eſtate to ſtrangers, when he thinks he is giving to his heir or relations, and when, if he had known the truth, he would have provided for that heir or relations, ſo as to prevent his beggaring himſelf. This has been a growing practice to ſupply young heirs; and the court has extended its remedy. At firſt the caſes are, where there is expreſs proof of groſs practice or actual impoſition: from thence it went to caſes, where on the face of the contract it was ſo groſs and unreaſonable a contract between the parties, the court, on preſuming a man would not enter into it but by impoſition, has relieved; of which one caſe among many is *Nott* v. *Hill.* 1 *Ver.* As the miſchief encreaſed, the court has extended its remedy. Where the bargain is ſo lucrative, and the perſon under neceſſity, ſo that the judgment of the court has been, that neceſſity alone could induce to make that contract, there has been relief; the firſt caſe of which kind is *Berney* v. *Pit*, 2 *C. C.* 136, 2 *Ver.* 14. a very remarkable caſe, and a ſtronger there could not be. It is ſtated alſo by Lord *Cowper* in *Twiſleton* v. *Griffith*, 1 *Wil.* 310. where were marks enough of impoſition to warrant relieving on that foot: but he choſe to eſtabliſh it on the general principle and Lord *Jefferies*'s decree, not on the particular circumſtances of the caſe; and he ſeems to rejoice in the conſequence, that this would put a difficulty on an heir to borrow on his expectancy. The laſt caſe is *Curwyn* v. *Milner*, 3 *Wil.* 293. where Lord *King* decreed relief; but ſaid, if it was new, he would not have gone ſo far, where ſuch a contract was fair, and done with open eyes; ſaying he thought himſelf bound by precedents, and that he ſaw no difference between an eſtate ſettled on an heir on his father's death and an expectancy of perſonal eſtate at death of a relation; it is the ſame kind of expectancy, that tempts to theſe kind of bargains, and the influence the ſame. On the other hand it is inſiſted, none of the particular caſes cited come within the circumſtances of this: that all thoſe of fraud, practice, or impoſition, are out of the caſe; it being a bargain ſent to market by the borrower, and the terms his own: no deſtitute heir under parental government; having a great perſonal eſtate, and ſo not in the circumſtances of the party ſeeking relief in other caſes; the bargain itſelf different, the riſk being different; and the bargain, in all its circumſtances, ſo equitable, that if the court ſhould enter into a nice examination of the proportion and riſk, it would appear, the defendant would have been out of pocket, if the grandmother had lived a little longer: that this court will not lay down a principle in general, that an heir or expectant may not contract on his expectancy: that there have been inſtances, where ſuch contracts have been carried into execution, as *Hobſon* v. *Trevor*, and *Whitfield* v. *Fauſſet*; that it is a ſufficient terror to ſuch contractors, that they are always liable to the examination of this court: and that they can never ſtand but on the reaſonableneſs and juſtice of the

contract; which will reſtrain one kind of men from preying on the follies of another. Theſe are the arguments on both ſides; and there would be danger and difficulty in giving an opinion on either: but no neceſſity for it; that being taken away by Mr. *Spencer* himſelf; who has made himſelf the judge, by voluntarily giving a new ſecurity.

The contract being confirmed without impoſition, not to be ſet aſide.

Which is the third point, ſuppoſing the court would relieve againſt this in its original, whether it will, when altered by the party in the ſtrongeſt manner, not unappriſed, and with his eyes open. There is no caſe of a contract ſo confirmed, which was not illegal, (but ſuch as the court would have relieved againſt in its original inſtance) where the court has relieved againſt the confirmation; unleſs obtained by fraud or oppreſſion, and then it has been conſidered as a continuance of the firſt oppreſſion; of which there are two caſes in *Ver.* Lord *Ardglaſs* v. *Muſchamp* and *Wiſeman* v. *Beake:* but no reſemblance to the preſent from either. There was no fraud, practice, or impoſition, in the original contract or ſubſequent ſecurity: the defendant was not very preſſing for his money; the ſecurity not being given until a good while after; which ſhews, no ſuit or diſtreſs was threatened; but fairly and voluntarily done, and upon intimation received that the defendant had a doubt, whether he could make good the contract in a court of equity. *Cole* v. *Gibbons*, 3 *Wil.* 290. and the note of the caſe at the bottom of that, is applicable to the preſent.

As there is nothing therefore to ſet aſide this contract on the foot of uſury within the ſtatutes; and next ſuppoſing it was ſuch as would be ſet aſide, if left to the conſideration of the court, yet as the party with his eyes open has bound himſelf to execute it, he ought to execute it. It is to too much to ſet it aſide; the penalty therefore is the only thing, which can be relieved againſt in this caſe.

Sir *John Strange*, Maſter of the *Rolls*.

There is no occaſion to introduce what I have to ſay with making a particular ſtate of the caſe: but as it depends on a variety of circumſtances, many of which muſt be conſidered in the argument, I ſhall content myſelf with taking them up in the courſe of it.

The queſtions, upon which I am to offer my advice, are three. Firſt, whether the original advancement of the 5000 *l.* in the manner, as depoſed by Mr. *Backwell* and diſcloſed in the defendant's anſwer, and the bond taken upon it, are to be conſidered as uſurious, and conſequently void in point of law? Secondly, whether, ſuppoſing the bond does not come within the ſtatutes of uſury, the

tranſaction or bargain in 1738. is of ſuch a nature, as will intitle the plaintiffs to be relieved in equity on the circumſtances attending that part of the caſe? Thirdly, whether what appears to have been done by Mr. *Spencer* after the death of the *Dutcheſs*, will in any and what manner influence the determination of this caſe?

As to the firſt, I concur in opinion, that this is not an illegal agreement made void by the ſtatutes of uſury. The prohibition will ſtand on the words and meaning of 12 *Anne* 16. for that does not materially differ from 21 *J.* 1. or 12 *C.* 2. and appears calculated for ſuch loans, wherein two principal circumſtances muſt concur: the repayment of the money in all events at a future day, and an agreement to give and receive an allowance of profit in the mean time for the money hired in a greater proportion, than allowed by the ſtatutes: neither of which circumſtances occur in the preſent caſe. The repayment of the money advanced depended on a contingency, which if it happened one way, the whole was totally loſt: during the pendency of this no intereſt or profit could accrue to the defendant, but a mere wager or bargain upon contingency which died firſt: ſo that the whole was at hazard. It is objected, that though the letter of the contract may be ſo, yet if the deſign of the parties was to borrow 5000*l.* and one ſhould give a greater uſe for the money, than the law allows, the putting it into this ſhape will not evade the ſtatute, in which ſtatute are very general words to take in all covin, ſhifts, *&c.* which I agree to: and therefore if the court can ſatisfy itſelf, that this was not in reality a bargain, whereon the principal was deſigned to be at hazard, and the ſhape, in which it was put, was only a contrivance to evade the ſtatute, it will be uſury, and conſequently void. Whether the agreement is uſurious, or not, may be determined two ways: 1*ſt*, By verdict of a jury on a plea of the corrupt agreement: 2*dly*, By the court's exerciſing their own judgment on the circumſtances of the caſe diſcloſed to them. The firſt of theſe methods could not be taken in this caſe; becauſe it appears, the bond was cancelled upon the giving the judgment after death of the grandmother, and therefore no action could be brought on it; and if there had been a *ſcire facias* at law on the judgment either againſt *John Spencer* or his executors, no plea of the corrupt agreement could be received; the judgment *redditum invitum* not being a contract or aſſurance, which are the words of the ſtatute: and this was the opinion of *B. R.* in *Foot* v. *Jones*, *Paſ.* 9 *G.* 2. the other method has been often taken, as in *Roberts* v. *Tremayn*, *Cr. J.* 508. Thus wherever the court has ſeen, that the contingency to put the principal in hazard is only added colourably, and only a nominal riſk, the court to prevent an evaſion of the ſtatute has determined it to be uſury: as in *Clayton*'s caſe, 5 *Co.* and other caſes, where the adding the contingency of a particular perſon's being alive at the end of a year

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was

was only a ſhift. So by *Holt*, *Comb.* 125. and *Carth.* 68. But a wager between two to have 40 for 20, if one was alive at a future day, would not be uſury. *Cr. El.* 642. *Button* v. *Downham*, and in 1 *Lut.* 470. Notice is taken of its appearing, that both principal and intereſt was at hazard. The preſent caſe is fully before the court, and proper for the exerciſe of their judgment. To ſay it is uſury, the court muſt be convinced, that it was the deſign of the defendant to make a loan of this, and to ſecure exorbitant profit for it, and calculated as a ſhift to evade the ſtatute. But I cannot think either from the evidence or the anſwer of the defendant, that it was the ſcheme, or even in contemplation of the party. It appears a mere wager, which of the two ſhould outlive the other. The 5000*l.* was actually advanced, not colourably: therefore none of the caſes cited prove this to be within the ſtatutes of uſury, or warrant the court to declare it void thereon. The word *lend*, on which ſome ſtreſs was laid, concludes nothing. Every advancement of money on *bottomry* is a loan; and it was properly obſerved to be called ſo in the acts of parliament: but it is the nature of the agreement and intent of the parties, into which the court muſt look to determine the queſtion. *Cr. El.* 642. puts it entirely on the queſtion, whether it was the intent of the parties to be a wager or a loan at intereſt. So in *Mo.* 398. It has been argued, that lending money on *bottomry*, where more is taken than the legal intereſt, is grounded on the conſideration of the profit to trade; and therefore it is ſaid not to be applicable: that certainly has been one reaſon, why ſo large a profit for the uſe of money has been allowed in that inſtance: but the general reaſon has been the not coming within the intent of the ſtatute: for if it had, the court could not depart from it: but the hazard, the lender runs, of never ſeeing a penny of this principal or any of the intereſt, takes it out thereof: and that holds as ſtrong in the preſent caſe; and is ſo laid down in general, where the principal and intereſt is in hazard, 1 *Sho.* 8, *Maſon* v. *Abdy*, and in 1 *Sid.* 27. a diverſity is taken between a bargain and a loan. Whether a hazard, or not, is conſidered as the rule for determining whether a bargain or loan. I am of opinion therefore, this bond does not come within the ſtatutes of uſury, and cannot be declared void at law thereon.

Bottomry.

Unconſionable bargains.

On the next queſtion, as the advice, I ſhall offer, will be grounded entirely, on what was done by Mr. *Spencer* after the death of the Dutcheſs, was I to ſuppoſe for argument's ſake, the plaintiffs were intitled to the relief prayed, I ſhall offer nothing as a determination of that branch of this caſe; though it may not be improper to throw out ſomething in general. I ſee no reaſon to quarrel with the principal caſes cited as the ground for the interpoſition of a court of equity: on the contrary I cannot help declaring, I concur with thoſe determinations, and do not mean in the leaſt to abate the force

of them. In the preſent caſe there are certainly many circumſtances, that caſt a favourable light on the defendant's part of the tranſaction. He does not appear to be a perſon having an intent of fraud. The ſcheme moved not from him, but from Mr. *Spencer*; on whoſe own terms the money was advanced without any haggling on the part of the defendant, after it was refuſed by others as not a defireable contract on the calculation of chances. Not that the hands of the court are tied up from relief from the want of fraud or impoſition: I have no jealouſy of any thing of that in this caſe: yet caſes may be, wherein this court would interpoſe to prevent improvident perſons from ſpending or ruining their eſtates, before they come to them, though no proof of actual fraud or impoſition: which is agreeable to the ſaying of Lord *Jefferies* in *Berney* v. *Pit*, when he reverſed Lord *North*'s decree. So was it conſidered in *Twiſleton* v. *Griffith*, and in *Curwyn* v. *Milner*. The neceſſity muſt be ſeen by every wiſe and conſiderate perſon. The courts keep a ſtrict hand over theſe agreements; which muſt indeed all ſtand on their own particular circumſtances; and perhaps it is not adviſeable to lay down any general rule about them, or more than is neceſſary to the relief in each particular caſe.

Therefore, without offering any advice on the bond in 1738. abſtracted from the ſubſequent tranſaction, I will proceed to the third queſtion; upon which I am of opinion, that the plaintiffs are intitled to no other relief againſt the bond and judgment in 1744. but as to the penalty, on payment of what remains due, and the intereſt from the death of the grandmother: and though I have given no opinion upon the former part of the tranſaction, yet I muſt take up this as conſidering the plaintiffs intitled to the relief prayed; as the caſe ſtood on the firſt agreement. And here it is not improper to take a ſhort view of the different ſituation, Mr. *Spencer* appears in in 1744, from what he was in 1738. When the firſt bond was given, he was notwithſtanding a large income involved in great difficulty for want of money to pay creditors; caſting about every way for a preſent ſupply; and ſuffering dangerous ſchemes to be privately hawked about; fearful leſt it ſhould come to his grandmother's ears, that he was mortgaging his expectations from her. It is not very clear, who took the firſt ſtep toward the new engagement after her death: the bond was not given until near two months afterward, though dated the next day after in order that it might carry intereſt from thence. But ſuppoſing the defendant had called on Mr. *Spencer* for his money before the 31*ſt* of *October*, (which, from his genteel behaviour in other parts I can hardly think, he did,) yet there is no circumſtance of force on Mr. *Spencer*; and the ſecurity, then ſtanding out againſt him, was only a bond for payment of the money; not a judgment, on which immediate execution could be ſued; which

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bond would have given him time enough to turn himſelf about, before he would be under a neceſſity to be expoſed to an execution. It appears to be his fixed deſign after her death to pay off the whole as faſt, as he could; and that with a preference to the defendant; who, he ſaid, had treated him like a gentleman. The defendant declared, he would not preſs him for his money, although he ſhould be glad to have it; and Mr. *Spencer* executed the bond and warrant of attorney freely and voluntarily, and well pleaſed therewith. It may be ſaid, that all this proceeded from his not being appriſed, that there could be relief in equity againſt the firſt bond. In *Cole* v. *Gibbons* the bill for relief and the anſwer were both read to the party, and yet the aſſignment was confirmed; which circumſtance, greatly weighing with Lord *Talbot*, is not wanting in the preſent caſe: it is what the defendant himſelf may make uſe of on his part, and it will be evidence for him, *viz.* that he anſwered to the manager of Mr. *Spencer*, that he doubted, whether the ſecurity would be good, and therefore only deſired a note or memorandum: ſo that from this doubt of the defendant Mr. *Spencer* was appriſed of the poſſibility of relief, he had, if he applied to a court of equity; which ſhews, he acted with his eyes open in this article of confirmation; that it was not a ſudden, but deliberate act, and agreeable to that frame of mind he continued in to his death; as appears from his ſubſequent letters.

Contracts of *poſt obits* are to be diſcouraged: and though the relief is not granted in the preſent caſe, yet ſhould the court hold a ſtrict hand over theſe ſort of contracts. How this would be in the caſe of a young heir under parental authority, I do not ſay. It may be improper to forejudge ſuch a caſe: but inconvenience there can be none in the determination of this. Yet in giving my opinion and advice in this very particular caſe againſt relieving the plaintiffs, I am far from blaming the plaintiffs, who are truſtees for the infant, for ſubmitting the caſe to the conſideration of the court; which I think very rightly done.

Lee CHIEF JUSTICE.

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The 1*ſt* point is, Whether on the evidence before the court relating to this tranſaction there is ſufficient appearing to determine this contract to be uſurious. As to the nature of uſury, conſidering it at common law, or in the law of nature, or divine law, or the civil law of other counties (of which there is a large account in *Pal.* 291.) it is unneceſſary to ſpend time on that ſubject; becauſe the idea of uſury is fully ſettled in this country by the legiſlature; which has made uſe of all the words, the language could furniſh, to prevent taking more than the legal intereſt, in which uſury conſiſts: and to attain this end the borrower is at liberty to diſcloſe every

every circumſtance in his contract, that it might appear, whether there was any ſhift, &c. It appears by 2 *And.* 15. and *Maſon* v. *Abdy*, *Carth.* where the difference is taken and ſettled, that where the hazard of loſing the principal is but a colourable contingency, the agreement is uſurious: but where the contingency is real and forceable, it is otherwiſe. I think, that is the material conſideration, and the ſubſtantial and true reaſon, that *bottomry*-bonds are not conſidered as uſurious on the conſtruction of the ſtatute itſelf; there not being words in the ſtatute to reach *Bottomry*-bonds, when they run a deſperate contingency of winds, ſeas, and enemies; the reaſons touching trade not being the true reaſons, although they might be inducements to courts to conſtrue the ſtatutes in a favourable way. So if on advancement of money by way of loan the lender will by any agreement between the parties, in whatever manner formed, have the repayment of the principal with profit exceeding the legal intereſt, that will be corrupt within the ſtatute of uſury. If therefore, two perſons ſpeaking together, one deſires 100*l.* and for the loan will give more, than the law allows, and for evaſion of the ſtatute a practice is invented, that the borrower ſhall grant to the lender 30*l.* *per annum* for ſo many years, this practice is within the ſtatute, and will be uſury, although the lender never has his 100*l.* again; for by this bargain by way of loan he has full ſatisfaction for his 100*l.* and more profit than the law allows; which is 1 *Bul.* 36. which brings the preſent caſe to the ſingle conſideration, whether the hazard, the defendant ran, of loſing the whole principal without ſatisfaction for the money advanced, was not a real hazard, which might require a reward beyond the legal and common intereſt: and where that is the caſe, it appears from all the authorities, that all bottoms on this in courts of law, that it is always thought, where the profits, the lender is to have, is as a reward for the hazard he is ſubject to, and not for the forbearance of the day of payment (which are the words of the ſtatute) they are not uſurious. In *Molloy* 314, 317. it appears, theſe real contingencies are not within the ſtatutes of uſury on this foundation.

Bottomry.

But on the ſecond point I think, it will be well worth the conſideration of a court of equity, whether they will not interpoſe in caſe of theſe hazardous bargains to pay double ſo as to prevent the lender's going away with ſuch an exorbitant gain? It is difficult to form any general rule, that can meet every caſe of this kind, that may happen: but they muſt in general be governed by the circumſtances in each caſe: only this may be always proper to be attended to, as far as may be, to bring all contracts, that are in nature of loans, to that mean preſcribed by parliament, that none take more than the legal intereſt: and by the caſes cited and ſtated in courts of equity it appears, they have uſed a ſagacious attention to diſcover, whether there is any fraud expreſſed, or from the nature of the tranſaction or perſon concerned, any thing carrying on the face of it

Hazardous bargains, unconſcionable.

an appearance of impoſition; as in the caſe of young heirs, &c. a court of equity has diſabled from taking advantage thereof, and interpoſed to prevent unconſcionable bargains. That therefore is a matter worth the regard of a court of equity ſo as to prevent all trade of this ſort, ſuch as is called *Jewiſh* intereſt, which ſeems a *malum* conuſable at common law. What has been done by Mr. *Spencer* after the death of the Dutcheſs, prevents the court from entering minutely into the conſideration of the firſt contract; for any objections thereto are taken away by himſelf, in whoſe place the plaintiffs ſtand. The firſt contract ſurely might recover ſtrength and be validated by the intervention of a new caſe, that was fit to create a right. If he was under apprehenſions of his grandmother, when the firſt ſecurity was given, yet they were at an end at the laſt. If he was an infant, when he gave the firſt bond, the contract would be voidable as to him: but if when of full age he gave a new bond, it would be good againſt him. In the caſe in *Dom.* 136. called the *Macedonian* decree, it is ſaid, that if any creditor lent money for a juſt and reaſonable cauſe ſufficient to ſupport the equity of the obligation, it was by a favourable interpretation of the decree of the ſenate excepted from the general prohibition according to the quality of the uſe, to which the money was put. The defendant has this exception in his favour; the uſe of this money being to pay juſt debts to tradeſmen; for if theſe contracts are to be ſet aſide upon the hatred to the creditor, who has made an improper loan, yet that imputation is taken away: and even in the caſe of a ſon, if the father approves or ratifies the obligation by paying part, or the ſon acquits it himſelf, it cannot be revoked; *Dom.* 137, 138. in his obſervations upon that decree. But it is ſaid, that though he was not under the ſame difficulty, when he gave this new ſecurity, as at the giving the firſt bond, yet he was a debtor then to the defendant, and liable to be called on by legal proceeding: but that cannot be a reaſon to ſet aſide this deliberate act of Mr. *Spencer*, againſt whom there was then no proceſs, but a readineſs in his creditor to take paper-ſecurity inſtead of money, which he had a right to. I rely on 3 *Wil.* 291. as a ſtronger caſe than this; being a deliberate act confirming an unreaſonable bargain when the party was fully informed of every thing, and under no ſurpriſe: that made it good. In *Cann* v. *Cann*, 1 *Will.* 727, Lord *Macclesfield* ſays, there is no colour to ſet aſide a releaſe, which the maker had a right to make, and was not ignorant of his right; and that ſolemn conveyances are not ſlightly to be blown over.

Confirmation thereof.

I entirely concur therefore in opinion.

LORD CHANCELLOR.

Before I proceed to give my own opinion in this caſe, I muſt take notice, that Ld. C. J. *Willes* has ſignified to me his entire concurrence

currence on theſe three points. Next, that the great and able aſſiſtance, I have had in this caſe, has made my taſk extreamly eaſy: and as I concur in the decree I am adviſed to make, the great pains taken in clearing up and conſidering the points might have excuſed me from taking up any time. One thing I ought to ſay in the outſet: that if I could have foreſeen, upon what particular point the judgment in this caſe would fundamentally turn, I ſhould have ſpared the judges the trouble of this attendance. As three points have been properly made at the bar, it is neceſſary to ſay ſomething to each.

The firſt is a mere queſtion of law upon the ſtatutes of uſury, and on the rules of law, and the ſame as in a court of law, if an action had been brought on the bond, and the whole matter had been diſcloſed in ſpecial pleading. If I had even now a doubt concerning it, I ſhould have held myſelf bound by the opinion of the judges as a matter within their conuſance, in like manner as if I had ſent this to be tried at law; in which caſe the court always decrees conſequentially to the trial. But I have no doubt about it; and concur in opinion. This queſtion was laboured by the plaintiff's counſel; many authorities cited; and ſtrong inferences made by them. I do not intend to go through them: but contracts on contingency are to be diſtinguiſhed plainly; for a wager on chance is not within the ſtatute, becauſe no loan. But if there is a loan of money with an agreement to receive back more than the principal and legal intereſt in any event, there, though a contingency is thrown in, on which the whole principal and intereſt may be loſt by poſſibility, it is uſurious and contrary to the ſtatute. On this it was inſiſted for the plaintiffs. I will not now enter into a critical diſpute, how far any ſuch contract, where by the falling out of the contingency one way or other the money may be loſt, is in ſtrictneſs a loan. The civil law has very nice and refined diſtinctions upon this: *commodatum & mutuatum* are there technical terms for a loan. By the firſt was meant, where the things lent were to be reſtored in *ſpecie*; by the ſecond, where in *genere* only: but in both the thing was to be reſtored in all events, and nothing was to be paid for the uſe or hire; which when it was ſo, was *locatum & conductum* by the *Roman* lawyers; under which perhaps all our laws would ſtrictly come. But theſe minute diſtinctions upon loans are not adopted by us; but we mix and confound their *commodatum & mutuatum*; as appears in an action upon a loan, which takes in both. So though intereſt is to be paid for it, it is with us ſtill a loan. So though money is to be advanced upon a riſk, which upon a contingency may be totally loſt, it is ſtill a loan of money; and all the books, treating of *bottomry*, call it money lent on *bottomry*. Beſides this is plain by the expreſs words of the *ſtat.* 11 *H.* 7. 8. which ſhews,

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they underſtood, that an adventure might be inſerted in a contract of a loan; and it is obſervable, that this, if real and fair, exempted it from the laws of uſury; though at that time all kind of uſury or taking intereſt was unlawful. By the law of *England* therefore the inſertion of a contingency will not of itſelf prevent a contract's being a loan. Conſider the reſult of the caſes cited on the ſtatute of uſury; which I will not repeat, but only deduce proper and natural inferences from them. Firſt, if there is a loan on contingency, in conſideration whereof an higher intereſt than the law allows, is contracted for forbearance, if the riſk goes only to the intereſt or *præmium*, and not to the principal alſo, though a real and ſubſtantial riſk is inſerted, it is contrary to the ſtatute; becauſe the money lent is not in hazard, but ſafe in all events; and no regard is then had, whether the contingency is real or colourable; as appears, from what *Dodderidge* J. ſays in *Roberts* v. *Tremayn*; who by the way takes it for granted, that ſuch a loan may be with us on contingency. Next, if the contingency extends to both, and there is a higher rate, than the law allows, regard is had, whether a *bona fide* riſk is created by the contingency, or whether only colourable; for if ſo, courts of law hold it contrary to the ſtatute, becauſe it is an evaſion to get out of the ſtatute; which is prohibited by the law itſelf. *Clayton*'s caſe, 5 *Co.* 70. and the caſe put by *Popham* in *Burton*'s caſe immediately preceding. So in *Maſon* v. *Abdy*. But where the contingency has extended to principal and intereſt both, and not colourable only, but a fair and ſubſtantial riſk is created of the whole, it takes it out of the ſtatute: though called a loan, it is conſidered as a bargain on chance, and differs little from a wager.

Bottomry. On this depends the caſe of *bottomry*; for I agree, that the approving thereof is from their being fair contracts on a real hazard, and not that they concern trade; though trade and commerce is taken into conſideration, but not alone relied on to ſupport uſury; for that cannot be. The plaintiffs counſel object to this by laying ſtreſs on certain expreſſions and *dictums* of judges in ſome caſes, that there muſt be no tranſaction or communication of borrowing and lending; and care muſt be taken, that there be no ſuch; and therefore as the firſt propoſal in the preſent caſe was to borrow money on a contract to pay two for one, it is uſurious notwithſtanding the contingency thrown in. A very right anſwer has been already given: that courts of juſtice are to regard the ſubſtance of things on a contract, and not mere words, which might be inaccurately uſed by the parties in private dealing. But another anſwer may be given: that in the moſt accurate books theſe expreſſions are applied to caſes ariſing on purchaſe of an annuity or ſales of goods and merchandize at a *præmium* or advanced profit beyond the rate of legal intereſt; in which caſes theſe expreſſions are properly applicable; but cannot be ſo to loans on contingency; that is a fair, real, contingency; for there from the nature of the thing the communication muſt

be about a borrowing and lending; as is plain from the caſe of *Bottomry*; and the caſe put by *Dodderige* J. in terms is of lending 100 *l.* &c. upon a caſualty, if it goes to the intereſt only and not the principal, it is uſury; which he clears by the caſe of *Bottomry*. The very ſtating of the caſe on the purchaſe of an annuity or ſale of goods proves the truth of this. An annuity may be purchaſed at as low a rate, as you can, provided it was the original negotiation to purchaſe and ſell an annuity: but if the treaty began about borrowing and lending, and ends in the purchaſe of an annuity, it is evidence, that it was only a method or contrivance to ſplit the payment of the principal and uſurious intereſt into ſeveral inſtalments, and conſequently that it was a ſhift; which is *Fuller*'s caſe, and *Tanfield*'s 4 *Leon.* and *Noy* 151, which I take to have been on the ſame deed as that in 1 *Brownlow.* So in the ſale of goods or merchandiſe it is lawful to ſell as dear as you can, on a clear bargain by way of ſale: but if it is firſt propoſed to borrow, and afterward to ſell goods beyond the Market, this is uſurious: of which there are two caſes in *Mo.* 397. The very putting theſe caſes ſhews, how proper and forcible thoſe expreſſions of the judges before mentioned are, when uſed in the purchaſe of an annuity and ſale of goods; but how improper, when thrown out in caſes of loans of money on contingency.

The ſecond queſtion is, ſuppoſing the firſt contract to be valid in law, whether it was contrary to conſcience, and to be relieved againſt in this court upon any head or principle of equity? I will follow the prudent example of not giving any direct and concluſive opinion. As it would be unneceſſary, it is ſafeſt not to do it: yet it has been made neceſſary to ſay ſomething on it. It cannot be ſaid, that ſuch contracts deſerve to be encouraged; for they generally proceed from exceſſive prodigality on one hand, and extortion on the other; which are *vitia temporis*, and pernicious in their conſequences; and then it is the duty of a court, if it can, to reſtrain them. This court has an undoubted juriſdiction to relieve againſt every ſpecies of fraud. Unconſcionable bargains.

1. Then fraud, which is *dolus malus*, may be actual, ariſing from facts and circumſtances of impoſition; which is the plaineſt caſe. Fraud, 4 Species.

2. It may be apparent from the intrinſick nature and ſubject of the bargain itſelf; ſuch as no man in his ſenſes and not under deluſion would make on the one hand, and as no honeſt and fair man would accept on the other; which are unequitable and unconſcionable bargains; and of ſuch even the common law has taken notice; for which, if it would not look a little ludicrous might be cited 1 *Lev.* 3. *James* v. *Morgan.* A 3*d* kind of fraud is, which may be preſumed from the circumſtances and condition of the parties contracting: and this goes farther than the rule of law; which is, that it muſt be proved, not preſumed: but it is wiſely eſtabliſhed in this court to prevent taking ſurreptitious advantage of the weakneſs or neceſſity of

of another; which knowingly to do is equally againſt conſcience as to take advantage of his ignorance: a perſon is equally unable to judge for himſelf in one as the other. A *4th* kind of fraud may be collected or inferred in the conſideration of this court from the nature and circumſtances of the tranſaction, as being an impoſition and deceit on the other perſons not parties to the fraudulent agreement. It may ſound odd, that an agreement may be infected by being a deceit on others, not parties: but ſuch there are, and againſt ſuch there has been relief. Of this kind have been marriage-brocage contracts; neither of the parties herein being deceived: but they tend neceſſarily to the deceit on one party to the marriage, or of the parent, or of the friend. So in a clandeſtine, private, agreement to return part of the portion of the wife, or proviſion ſtipulated for the huſband, to the parent or guardian. In moſt of theſe caſes it is done with their eyes open, and knowing what they do: but if there is fraud therein, the court holds it infected thereby, and relieves. So where a debtor enters into a deed of compoſition with his creditors for 10*s.* in the pound, or any other rate, attended with a *proviſo* that all creditors executed this within a certain period, if the debtor privately agrees with one creditor to induce him to ſign this deed, that he will pay or ſecure a greater ſum in reſpect of his particular debt: in this there can be no particular deceit on the debtor, who is party thereto: but it tends to deceit of the other creditors, who relied on an equal compoſition, and did it out of compaſſion to the debtor. This court therefore relieves againſt all ſuch underhand bargains. So of *præmiums* contracted to be given for preferring or recommending to a publick office or employment: none of the parties are defrauded; but the perſons, having the legal appointment of theſe offices, are or may be deceived thereby: or if the perſon, agreeing to take the *præmium*, has authority to appoint the officer, it tends to publick miſchief by introducing an unworthy object for an unworthy conſideration. Theſe caſes ſhew, what courts of equity mean, when they profeſs to go on reaſons drawn from publick utility. To weaken the force of ſuch reaſons they have been called political arguments, and introducing politicks into the deciſion of courts of juſtice. This was ſhewing the thing in the light, which beſt ſerved the argument for the defendant, but far from the true one, if the word *politicks* is taken in the common acceptation: but if in its true original meaning, it comprehends every thing, that concerns the government of the country; of which the adminiſtration of juſtice makes a conſiderable part; and in this ſenſe it is admitted always. To apply this: thus far, and in this ſenſe, is relief in a court of equity founded on publick utility. Particular perſons in contracts ſhall not only tranſact *bona fide* between themſelves, but ſhall not tranſact *mala fide* in reſpect of other perſons, who ſtand in ſuch a relation to either as to be affected by the contract or the conſequences of it; and as the reſt of mankind beſide the parties contracting are concerned, it is properly ſaid to be governed

governed on publick utility. The laſt head of fraud, on which there has been relief, is that, which infects catching bargains with heirs, reverſioners, or expectants, in the life of the father, *&c.* againſt which relief always extended. Theſe have been generally mixed caſes, compounded of all or ſeveral ſpecies of fraud; there being ſometimes proof of actual fraud, which is always deciſive. There is always fraud preſumed or inferred from the circumſtances or conditions of the parties contracting: weakneſs on one ſide, uſury on the other, or extortion or advantage taken of that weakneſs. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground, on which there was relief againſt *Pit*; there being no declaration there of any circumvention, as appears from the book, but merely from the intrinſick unconſcionableneſs of the bargain. In moſt of theſe caſes have concurred deceit and illuſion on other perſons not privy to the fraudulent agreement: the father, anceſtor, or relation, from whom was the expectation of the eſtate, has been kept in the dark: the heir or expectant has been kept from diſcloſing his circumſtances, and reſorting to them for advice, which might have tended to his relief and alſo reformation. This miſleads the anceſtor; who has been ſeduced to leave his eſtate not to his heir or family, but to a ſet of artful perſons, who have divided the ſpoil beforehand. Conſider, which of theſe ſpecies is in the preſent caſe. There is no colour of evidence of actual fraud in the defendant; who did not think, he was doing any thing immoral or unjuſt: altho' if the declarations of Mr. *Spencer* can be believed, the defendant had a miſgiving, how far it could be held good in this court. But tho' this caſe is clearer of actual fraud than almoſt any, that has come, yet ſeveral things are inſiſted on for the plaintiffs as neceſſity on one ſide and advantage taken of it on the other: unconſcionableneſs in its nature from the terms of paying two for one in caſe of the death of an old woman the next week or day: that there was deceit upon her, who was in *loco parentis*, from whom were his great expectations. This was however the thing intended. I admit alſo, there are more circumſtances alleged on the ſide of the defendant to weaken and take off, than have concurred in moſt caſes of this kind. Mr. *Spencer* was of the age of thirty; poſſeſſed of a great eſtate of his own; not weak in mind, but of good ſenſe and parts: tho' in that the witneſſes differ. If it was neceſſary to give an opinion upon this point, I ſhould conſider the weight of theſe objections and the anſwers to them: but as it is not, I will only conſider the contingency inſerted, which was to cure the whole. I would not have it thought, that the inſertion of ſuch a contingency would in every caſe ſanctify ſuch a bargain. Suppoſe ſuch a bargain made by a ſon in life of his father or grandfather, on whom was his whole dependency: I appeal to every one, what the conſequence of it would be. Whether ſuch a contingency is inſerted or not, it will come to the ſame thing; the creditor knowing the fund for payment

muſt depend on the debtor's ſurviving the father or grandfather, whether it is ſaid ſo or not: and therefore I have always thought, there was great ſenſe, in what *Vernon* reports to be ſaid by the court in *Bernay* v. *Pit*: "that the expreſſing the death of the ſon in life of "the father makes the caſe worſe, *&c.* I have not mentioned the reaſons, drawn from the diſcouragement of prodigality and preventing the ruin of families: conſiderations of weight; and ingredients, which the court has often very wiſely taken along with them. It is ſaid for the defendant to be vain and wild for the court to proceed on ſuch principles: if it had been ſaid, it was ineffectual in many inſtances, I ſhould have agreed thereto; but I cannot hold that to be vain and wild, which the law of all countries and all wiſe legiſlatures have endeavoured at as far as poſſible. The ſenate and law-makers in *Rome* were not ſo weak as not to know, that a law to reſtrain prodigality, to prevent a ſon's running in debt in life of his father, would be vain in many caſes: yet they made laws to this purpoſe; *viz.* the *Macedonian* decree, already mentioned; happy, if they could in ſome degree prevent it: *eſt aliquod prodire tenus.* It is ſaid for the defendant that this would be to aſſume a legiſlative authority; and that ſeveral acts of parliament have been thought neceſſary to reſtrain and make void contracts of a pernicious tendency to the publick. What can properly be called ſuch an aſſuming in this court, I utterly diſclaim: but notwithſtanding I ſhall not be afraid to exerciſe a juriſdiction, I find eſtabliſhed, and ſhall adhere to precedents. As far therefore as the court went in *Bernay* v. *Pit*, in *Twiſleton* v. *Griffith*, in *Curwyn* v. *Milner*, and the opinion of Lord *Talbot* on the original tranſaction in *Cole* v. *Gibbons*, ſo far, and as far as theſe principles do naturally and juſtly lead, I ſhall not ſcruple to follow. The acts of parliament inſtanced will be found to be made, (many of them) not for want of power in this court to give relief in many of theſe contracts, but to make them void in law, to give the party a ſhort remedy againſt them. The judgment, I am going to give, will not be founded upon this: but I have done it, that the work of this day may not be miſunderſtood, or precedents thought to be ſhaken: not that this eſtabliſhes ſuch a contract, as is called fair like killing fairly in a duel, which the law does not allow as an excuſe for murder. Junct annuities and *poſt obits* are grown into traffick; which ought to abate of its fairneſs.

As to the laſt queſtion, of the ſubſequent acts of Mr. *Spencer*: this is the point, on which the determination of this caſe will depend; and I entirely agree with the opinion delivered already. Had the firſt bond been void by the ſtatutes of uſury, no new engagement would have made it better: the original would have infected it. But if a man is fully informed and with his eyes open, he may fairly releaſe, and come to a new agreement, and bar himſelf of relief, which might be had in this court. The material inquiry is, whe-

ther this was done after full information, freely without compulſion &c.? and upon the beſt conſideration of the evidence it appears to be ſo done, and with fairneſs. Firſt, the condition of the neceſſity of Mr. *Spencer* was over; for tho' he had no power over the capital of this acceſſion of eſtate, yet it was ſo great a one, that little more than one third of a year's income would have paid off the whole. If that then be a ſtate of neceſſity, how far ſhall it be carried? Then, the ſtate of expectancy was over by the death of the dutcheſs; and alſo the danger of her coming to the knowledge of his conduct and circumſtances, and his fear of offending her; which was the principal reſtraint upon him: ſo that there was no anceſtor or relation left, upon whom any deceit could be committed in conſequence of any new agreement: and it appears, that before this new bond he had ſufficient notice, that he had a chance at laſt, that he might have relief in equity, from the defendant's own declaration to him of his doubt whether it would be good. Laſtly, there was no impediment againſt his ſeeking relief by diſcloſing the whole caſe at that time in a court of juſtice. Under theſe circumſtances was the new engagement, without any fraud, contrivance, or ſurpriſe to draw him in; which operates more ſtrongly than the deed of confirmation in *Cole* v. *Gibbons*, that it is too much to ſet it aſide. The only difference to diſtinguiſh that from this caſe was, that there the releaſor was not in the power of the releaſee, here Mr. *Spencer* was debtor, and his creditor might immediately have diſtreſſed him by an action: but the anſwer is, there was neither an attempt nor threat to bring an action. It is objected further for the plaintiffs, that *Cole* v. *Gibbons* was a ſingle caſe; and that there are ſeveral precedents, in which ſuch new ſecurity and ſubſequent tranſaction was not ſufficient to give a ſanction to a demand of this kind: as in Lord *Ardglaſs* v. *Muſchamp*: but the circumſtances there ſhew it not to be at all applicable: then the confirmation in *Wiſeman* v. *Beak* was ſtill more extraordinary; and that was a very extraordinary invention of Serjeant *Philips* of a bill to be foreclоſed againſt a relief in equity. In both theſe caſes the original tranſaction was groſsly fraudulent: but I have only ſhewn it here to be a doubtful object of relief in this court; which ſurely is the moſt proper caſe of all others to put an end to by a new engagement.

On the whole therefore the only relief is that, which I am adviſed to give, againſt the penalty of the laſt bond.

The only doubt, which could ariſe on this, is as to coſts; to which the defendant is not intitled. The plaintiffs are only executors; they had a probable cauſe of litigating this contract, which is far from deſerving favour, and were in the right to ſubmit it to the judgement of the court: and it is obſervable, that in *Cole* v. *Gibbons*, which was on this point, the bill was diſmiſſed without coſts; and no coſts given on the other bill, but on the contrary deducted. There was indeed

indeed in that caſe no penalty, as there is here: but ſtill that does not take away the diſcretion of this court in reſpect of coſts according to the circumſtances of the caſe: and there are ſeveral caſes of a bond with a penalty diſputed, where, though the coſts at law will undoubtedly follow the demand, yet on the circumſtances coſts in this court are refuſed.

Therefore let it be referred to the maſter to take an account of the principal, and intereſt due on the bonds of 1744, and the judgment thereon, and to tax the defendant his coſts at law; and an account of the money paid by Mr. *Spencer* to the defendant; and let that firſt be applied to diſcharge the intereſt, and then to ſink the principal; and all juſt allowances be made; and on payment by the plaintiffs to the defendant of what is found due, let the defendant deliver up the bond to be cancelled, and acknowledge ſatisfaction on the judgment: but that muſt be at the expence of the plaintiffs: and if the plaintiffs pay, what is ſo found due, let there be no coſts in this court on either ſide: but otherwiſe let the bill be diſmiſſed with coſts.

Caſe 51.

Prieſt *verſus* Parrot, *Feb.* 8, 1750-1.

A young woman of good character comes to live with *A.* knowing he was married, is ſeduced by him, and cauſes ſeparation from his wife, and has a grant or bond from him: her bill for payment diſmiſſed.

A Bill for payment of 100*l.* and an annuity of 40*l.* was granted by defendant to plaintiff; who, being a young woman, came to live in the family of defendant, then a married man, as a companion to his ſiſter; and afterward occaſioned a ſeparation between him and his wife.

LORD CHANCELLOR.

This caſe is in ſome parts new: nor do I remember, it has directly come before the court. The conſideration of the grant is plain; for though expreſſed to be for divers cauſes and conſiderations, it is plain on the evidence, to what it is applied: nor is it diſputed. It is as plain alſo to me, that what this unhappy woman, (who has been very criminal alſo) has ſubmitted to, was from the ſeduction of defendant; for her youth, when ſhe came into the family, and good character before, are evidence thereof: and that certainly has been the principal ground of the determinations in this court, where it has been conſidered as *præmium pudicitiæ*, when the young woman ſubmitted to the ſuggeſtion of the man, and was guilty of no fault before. But I know no caſe, where the court has given countenance to theſe ſort of bonds in caſe of a married man, ſhe knowing it. That differs the caſe; becauſe perſons, who ſubmit to a temptation of that ſort, are without excuſe; they know abſolutely, they are doing a wrong,

See Gray v. Roope Vernet. 153. & the references by William Ibid. 157.

wrong, which cannot be recovered or healed, and which occaſions miſchief to families. That differs it from the caſes, wherein the court has gone ſome lengths to make ſome proviſion for ſuch unfortunate people. Yet if this is a family of opulence, and this a poor woman ruined by his temptation and corruption, it very much deſerves their conſideration, whether ſhe ſhould ſtarve: if therefore there is any probability of the family's doing any thing of that kind, as it was the act of the defendant the occaſion of it, I would let the cauſe ſtand over.

I own, my preſent opinion is, I cannot give relief for thoſe reaſons, which diſtinguiſh the caſe extremely and materially from others which have been determined. Where a young woman, appearing to be modeſt before, is applied to by a man, and ſubmits to his temptation, he does a great injury: but ſhe knows, the crime ſhe ſubmits to, is not ſo aggravating as adultery; and ſhe may be inclined to ſuppoſe, he will be induced to marry her; and there are often ſuch promiſes, which it is almoſt impoſſible to give evidence of: if the parties are both ſingle, there is room for preſumption thereof: and if that is the caſe, the ſubſequent marriage takes off the enormity of the offence before, and in moſt countries of *Europe* even legitimates the iſſue; which admits of preſumption, and is ſome excuſe: and beſide in ſuch caſe people know, they are doing that, which is not of ſo bad conſequence in families. Whereas when a Man takes and keeps a miſtreſs under the noſe of his wife, who thereupon leaves her huſband, that is ſuch a crime, as ſtares every one in the face: and that is this caſe. She knew of it, and lived in the very family, where ſhe ſaw all this. It then admits no excuſe; and if a conſideration of that kind had been recited in the deed itſelf, or if in a bond, it would be void in law, nor would be countenanced in this court. In other circumſtances the court has made a diſtinction between the caſes, where it would not relieve, and where it would give aſſiſtance. In Lady *Anandale* v. *Harris* the commerce was wholly after death of the firſt wife, and before the ſecond marriage, and no proof to impeach the character. This court ought not to warrant this, which would be of bad example in caſe of married perſons, and encourage people to enter into agreements of this kind. It is impoſſible but ſhe muſt know, what ſhe entered into was wrong, and for which there can be no excuſe. On the whole therefore the bill ought to be diſmiſſed, but without coſts. Had ſhe not known, that he was married, as if the wife was at a diſtance, or if any impoſition was proved on her, it would be a different thing: but nothing of that appears in this caſe. She entered into the family knowing it, and continued ſo as to occaſion a ſeparation: and this court ought to endeavour to preſerve virtue in families.

2 Wil. 432. Eq. Ab. 87.

Caſe 52. Andrew *verſus* Clark, *Feb.* 9, 1750-1.

At the *Rolls*, Sir *John Strange*, *M. R.*

Elizabeth Farnſworth by will gave ſeveral legacies: but firſt gave one ſhilling apiece to her brother and ſiſter, and a general legacy of 50 *l.* apiece to her two executors.

Money legacy to next of kin, as well as to executors, prevents them not of the reſidue, though ſuch legacy was but one ſhilling.

The bill was by the next of kin claiming the reſidue as undiſpoſed; citing among other caſes *Rachfield* v. *Careleſs*, 2 *Wil.* 158, and *Matchel* v. *Hunt*, by Lord *Chancellor*.

Maſter of the Rolls.

It is agreed, that the giving a money-legacy to the next of kin as well as to the executors does not prevent the next of kin from claiming the reſidue of the perſonal eſtate. I do not ſee, how this differs from the other caſes: for to be ſure the court cannot go on the vulgar acceptation of the meaning of giving but one ſhilling. It ſtands then in the common light; and the rule of law would be, that it belonged to the executors: but it is now ſettled, that the court raiſes an equity for the next of kin. The reaſon is, firſt that by giving executor a money-legacy ſhe means to give no more. On the other hand the next of kin is preſumed, unleſs the contrary appears, to be acceptable to the teſtatrix. But whether ſo or not, the law will not ſtrip them of that benefit, unleſs ſomething to the contrary; nothing which is here. If I was to give my private ſentiment, I ſhould be apt to think, that by giving one ſhilling it was the intent not to give more. But I cannot in a judicial capacity lay any ſtreſs on that: if it was not ſo candidly admitted by the counſel for the executors, I ſhould have taken time to have looked into the caſes.

Ld 3. Wms 43.

N. It was ſaid at the bar, that the reaſon of giving one Shilling is, becauſe by the civil law it is neceſſary to ſhew, all the children were in view.

Caſe 53. Duhamel *verſus* Ardovin, *Feb.* 11, 1750-1.

Whereas my daughter is very ill, if ſhe dies, I leave the revenue of my perſonal eſtate to my wife.

—— *Marbeuf* made his will in *French*; in the beginning of which he ſaid, he thereby gave all his worldly goods and eſtate. Afterward he gives particular legacies, and makes a proviſion for his wife, Then ſays, "whereas my daughter *Marianne* is very ill, "if ſhe dies, in that caſe I leave to my wife the revenue and "dividends

" dividends of what little eſtate I have : but if my daughter " lives, my wife ſhall enjoy her dower only. *Item* I give to my " daughter *Marianne* the reſidue and dividend." Then, if ſhe dies without children, he gives ſeveral pecuniary legacies : concluding with, " I give to my brother *Lewis Marbeuf ce que ce* " *trouvera.*"

Daughter ſurvived teſtator, but died of that illneſs; it goes to wife for life.

Enfants in a French will meant not iſſue, but children, and the limitation over not too remote. And *ce que ce trouvera* a good reſiduary bequeſt for what ſhall be left.

The daughter ſurvived teſtator : but died of that ſame illneſs, which was a cancer, without iſſue. This bill was brought by her huſband as adminiſtrator to her, claiming the whole.

For plaintiffs. The words of the will import the daughter's dying in life of teſtator, not a dying of that illneſs or at any time afterward ; for it would be abſurd to put a condition, which muſt neceſſarily happen. She ſurviving teſtator, that contingency has not happened ; and then the wife of teſtator will not be intitled to that revenue and dividends. Then the *Item* introduces a general gift to the daughter of the reſidue, independent of what went before. " *If ſhe dies without children,*" is too remote ; for it means a dying without iſſue generally. The word in the original is *enfants* ; which is as large as *iſſue*, and may take in grand-children : the latter words are the moſt looſe that can be, to claim the reſidue ; and then, if any doubt ariſes, the court will determine in favour of thoſe claiming by the law of nature, not the claimants under the will.

LORD CHANCELLOR.

There is no colour for the plaintiff's claim of the reſidue of this perſonal eſtate as repreſentative of his wife ; nor to ſay there is an inteſtacy as to any part ; for teſtator plainly intended to diſpoſe of the whole, beginning with the words commonly uſed in the introduction of wills in this kingdom. *Goods* and *eſtate* mean the ſame thing, and are co-extenſive. I am of opinion, teſtator meant, if his daughter died of that illneſs ; which he thought would happen in a ſhort time, (and it did ſo in fact) in which caſe he intended, all the income and revenue of his perſonal eſtate ſhould go to his wife during life : and though it is *bien* in the ſingular number in the original, it will take in the whole as if in the plural, and means *all my eſtate.* Then the wife will be intitled to the uſufructuary intereſt in all his goods during her life, and the plaintiff has no right to a demand out of that income. I cannot put the conſtruction, that *enfants* meant *iſſue*, eſpecially to make it too remote and the will void ; and there has been a caſe on a *French* will, wherein I determined otherwiſe, *viz.* that it meant children : and beſide there is

ſome-

ſomething in the ſubſequent parts of this will, which confines it to children. Conſequently the bequeſt over will be good, and an end put to the argument of it's veſting in plaintiff's wife, and going to him as her adminiſtrator. But ſuppoſing the contingency there put was not to mean the daughter's dying of that illneſs, but a dying in his life: ſhe died without children, and conſequently the other takes place. The laſt clauſe concerning *Lewis* means, what ſhall be left, from the idiom of that language: and I think it a very ſufficient reſiduary bequeſt, as ſtrong as *I leave all to my mother*, including the whole not particularly diſpoſed of before: and that falls in with the beginning, as not intending to dye inteſtate as to any part. But I do not rely barely on the words: it was a natural diſpoſition and intent; his daughter being then likely to dye of a violent diſtemper, it was natural for him to make a larger proviſion for his wife in that event, and afterward to give it to his brother.

Caſe 54. Byas *verſus* Byas, *Feb.* 15, 1750-1.

At the Rolls.

Copyhold ſurrendered to uſe of will, paſſes by general words all my real eſtate. But otherwiſe if not ſurrendered, unleſs teſtator had only copyhold and no freehold. Where copyhold is deviſed expreſly, want of ſurrender ſupplied for a wife, children or creditors: no others.

See 3. Bro. Cha. Cas. 188.

A. Seiſed of freehold, and of copyhold of the nature of *Burrough English* deſcendable not only to the younger ſon but to the younger daughter, which copyhold was not ſurrendered to uſe of his will, in the introduction to his will deſires all his juſt debts to be paid, and makes a proviſion for his daughters and for his wife, and a farther eventual proviſion for the daughters after the death of the wife: and then all the reſt and reſidue of his eſtate real and perſonal, of what nature or kind ſoever the ſame might be or conſiſt of at the time of his death, he gives to his wife, her heirs, executors, adminiſtrators and aſſigns.

The plaintiff, the wife, inſiſted, that teſtator having thus made uſe of a number of words, it takes in all ſorts of eſtates, he might be ſeiſed of at his death: and that the court will ſupply the want of ſurrender; for this ought to be conſidered, as if creditors were concerned, and like 1 *Wil.* 444, and 3 *Wil.* 96.

For defendant *the youngeſt daughter*. Suppoſing the wife ſtands in the next rank to creditors, and the court would ſupply the want of ſurrender for the wife, yet on the face of the will an intent ſhould appear, that the copyhold ſhould paſs: but here is no mention of it, nor any thing to induce the court to think, teſtator intended this for her. In *Ithel* v. *Beane* 28 *February* 1748-9, a deviſe was made of all real eſtate ſubject to payment of debts: teſtator had no freehold, but only copyhold not ſurrendered to

Ante.

to uſe of the will: *Lord Chancellor* held, that if teſtator had any freehold, the copyhold would not be liable to payment of debts: but having no freehold it was liable.

Sir *John Strange*, Maſter of the *Rolls*.

The words uſed by teſtator cannot poſſibly carry it further than the general words *all his real eſtate*; which will of itſelf take in all the eſtate, teſtator was ſeiſed of, of whatever ſort without the addition of theſe particular words. It ſtands therefore for conſideration upon the general expreſſion of *all the reſt, &c.* There is no caſe, where there is freehold as well as copyhold, and no notice taken of the copyhold in the will, that the court has ſupplied the want of ſurrender. Where copyhold lands are deviſed expreſſly to wife, children, or for creditors, nothing paſſes in point of law for want of ſurrender: however a court of equity ſupplies it in thoſe favourable inſtances for the purpoſes of the will, but not for others: which is on the plain declaration of teſtator by expreſſly naming copyhold eſtate. If he had none but copyhold, *all my real eſtate* would have been ſufficient to paſs the copyhold though no ſurrender had been made to uſe of the will. But the general heir at law, or heir by particular cuſtom, has been always ſo favoured as not to be diſinherited by implication or inference from the particular wording of the will. The caſes, that have been, have turned in the conſtruction of theſe words upon the queſtion of fact; whether the teſtator had, what would anſwer the words of his will, on which the words would operate? Then the ſurrender ſhould not be ſupplied; as was before Lord *Talbot* in 1735. and the caſe of *Bethlehem Hoſpital*, 10 *June* 1735. that *all my lands* would not paſs copyhold lands not ſurrendered, if there were other lands to ſatisfy it: but if ſurrendered, that will explain the general words, and paſs it. Here is that, which would come within the deſcription of real eſtate. Then without ſurrender to uſe of the will or mention of copyhold the court will not take it from the heir. It is ſaid, this ought to be conſidered as if creditors: but by this will the real eſtate is not ſubjected to payment of debts as in the caſe in *Williams*. In the preſent caſe there is nothing either by act, as by ſurrender, or by words though no ſurrender, to warrant the court to ſay, the younger daughter is diſinherited of that, which by law ought to deſcend to her, and that the mother is intitled to the benefit of this copyhold. The bill therefore muſt be diſmiſſed: and there was a ſtrong caſe for this purpoſe before *Lord Chancellor*, and the laſt.

Heir general or by cuſtom not diſinherited by implication.

Case 55. Wilson *verſus* Ivat, *Feb.* 16, 1750.

I see a note of this case from the Register's book 3. Bro. Cha. Cas. 29. J

At the Rolls.

One executor, a ſpecifick and reſiduary legatee, dies in teſtator's life: it goes not to next of kin, but lapſes to the other executor, having no legacy, though a real eſtate in fee deviſed to his wife.

But see 3. Bro. Cha. Cas. 20.

A Man made his wife and the defendant executors of his will; having thereby given her ſeveral ſpecifick legacies, and made her reſiduary legatee; and to the wife of the defendant a real eſtate in fee. Teſtator's wife dies in his life. Defendant as ſurviving co-executor claimed, whatever ſurplus of perſonal eſtate there was, as having no legacy. The plaintiffs were next of kin.

Sir *John Strange*.

It is almoſt impoſſible but in the length of time, wherein this queſtion has been argued, there muſt have been inſtances of ſpecifick legacies deviſed to a perſon, who died in life of teſtator. But it is ſaid, there is no precedent. I will not make a new one without proper conſideration of the caſes and the reaſons of them. The court has certainly from time to time extended this relief againſt executors, though by ſteps. I ſhould take it, that, as it ſtands on the authorities, in general the executor is *primâ facie* intitled, unleſs there is ſomething from whence a contrary intent can be raiſed in equity to the benefit of next of kin; for in point of law the bare making an executor veſts in him, what is not otherwiſe given away; which anſwers the objection, that there muſt be ſomething ſhewing an intent in his favour. The contrary is to be rather ſhewn on the other ſide: ſo that he will take as executor, unleſs reaſonably ſhewn, that teſtator might not intend ſo large a benefit to him. In legacies to executor, though the caſes are both ways, yet it is now ſettled, that a pecuniary legacy will exclude him from the reſidue not given: but I take it in the caſe of mourning to be otherwiſe: that if mourning is left to all the relations, and the executor is one among others, it is not determined,* that ſhall exclude him from the reſidue: but if it was a legacy of 20*s.* it would be ſufficient to the preſent caſe. In the caſe of the death of one tenant in common of a reſidue, there was an expreſs declaration, that the reſidue ſhould not go to executor: and in the late caſe of the *Biſhop of Cloyne* v. *Young*, cited for plaintiff, *Lord Chancellor* thought, there was ſtrong evidence of intent, that the executor ſhould not have it; and conſidered it, not that the executor wants an expreſs declaration, that he ſhould have the perſonal eſtate, but looked into it to ſee, if any thing declaring an intent he ſhould not have it: and that is agreeable, to what the court has gone into to raiſe almoſt any ſort of equity for the next of kin to prevent executors going away with it. A bill was brought in by Lord *King* to

Executor as ſuch takes what is not given away, unleſs contrary intent ſhewn.

Pecuniary legacy excludes him; unleſs mourning. Q.

+ See acc. 2. Atk. 220.

* Said at the bar to be ſo determined.

Ante. December 7, 1750.

to ſettle this matter; which did not fail on any particular reaſon; but unfortunately there was a difference between the two houſes, and this was thrown out by way of repriſal; for I well remember the hiſtory of it. I ſee no difference in the caſe of a legal reſiduary legatee (which I call an executor) if there is nothing to controul him, and no diſpoſition of it. The caſe of lapſe of part of a reſidue does not conclude ſo ſtrongly to the caſe of ſpecifick legacy lapſing in this manner: and I ſhould rather think, if no caſe to the contrary, it has ariſen from being taken for granted, paſſing *ſub ſilentio*, that where a legacy to a perſon who dies in life of teſtator, it falls of courſe to the perſon, who by teſtator expreſſly or by the law, is the proper perſon, in whom the reſidue is to veſt. I incline therefore, that theſe ſpecifick things given to the wife will not be conſidered in the ſame light as the diſtribution of the reſidue in the caſe cited, but will lapſe to executor, who ſtands in place of teſtator: and it is material, that if teſtator had meant, it ſhould have gone otherways, he might have left it to other particular relations, provided for by the will; and he lived four years afterward. So that my preſent opinion is, that the executor is intitled thereto, and the bill muſt be diſmiſſed as to the perſonal eſtate; but if you meet with a caſe otherwiſe determined on a lapſed legacy, I ſhall be very willing to hear it. It was ſaid, the defendant was not to be conſidered as a mere executor, but as taking a benefit by the will, having the inheritance of a real eſtate to his wife, which intitles him to the receipt of the rents and profits in her right, and he would be intitled to a freehold during life as tenant by curteſy, if he had a child by her: but that cannot affect this caſe. In *Johnſon* v. *Twiſt*, 26 *March* 1734. a legacy of 12*l.* in money and uſe of plate to one executor, and nothing to the other, was held by Ld. *Talbot* no reaſon, why the ſurplus ſhould be diſtributed to next of kin, but ſhould go to both executors.

For plaintiff was cited *Wright* v. *Horne C. B.* by *Eyre* C. J. where deviſee of part of a real eſtate, the reſidue of which was given over to *B.* died in life of teſtator: held, he died inteſtate as to that, and it ſhould not go to *B.* which has been ſince held by *Lord Chancellor* to be a right determination.

Baker *verſus* Baker, *Feb.* 19, 1750. Caſe 56.

FRANCES BROMFIELD, having a power notwithſtanding coverture to diſpoſe of an eſtate, in 1733. deviſes it in truſt to ſell ſo much as ſufficient to pay debts; and a rent-charge to her daughter for life excluſive of any huſband; and all reſidue of the rents and profits to her daughter's eldeſt ſon until he ſhould attain twenty-one; and after twenty-one the lands to ſuch ſon and

heirs of his body; if he ſhould dye before that age, to ſuch other ſon as her daughter ſhould have, who ſhould attain twenty-one, and the heirs male of his body, the eldeſt to be preferred. If no ſuch ſon ſhould attain that age, then to iſſue female of her daughter; and for want of ſuch iſſue to her own right heirs for ever.

The daughter at time of making the will and death of teſtatrix was her only child, and was then in the *Indies*, where during the life of one *Lavarock*; whom ſhe had married in the *Fleet*, ſhe married Mr. *Baker*, by whom ſhe had one ſon.

The truſtee entered, and acted. The daughter in 1742. brought a bill againſt the truſtees, *&c.* and taking notice that ſhe had no iſſue, was intitled not only to her rent-charge, but to all the reſidue. The cauſe was heard by conſent, and a decree for conveyance to new truſtees on the truſts in the will; which was done; and ſhe received and converted the rents and profits to her own uſe. The ſon, coming of age, brought this bill for an account thereof, and conveyance of the eſtate, *&c.*

For plaintiff. The decree was pronounced on a ſuppoſition, that defendant had no iſſue. The queſtion is, whether plaintiff is not intitled under the deſcription in the will, and who is meant by teſtatrix? The only objection to it by defendant, who claims as heir at law to teſtatrix, is, that plaintiff is not a legitimate ſon. A baſtard may become a purchaſer, and have an eſtate given in poſſeſſion or remainder under a will or deed by deſcription of the perſon. The general caſes have been, where named by the *chriſtian* name ſon of ſuch a one. But in *Jenk. Cent.* 203, ſon or daughter in a feoffment as well as will is a good name of purchaſe, though illegitimate. *Perk. Grants* 11. *Dy.* 313. and *Mo.* 10. and 39 *E.* 3. 11. cited in *Sir Moyle Finch*'s caſe, 6 *Co.* and 41 *E.* 3. 19.

LORD CHANCELLOR.

The plaintiff is certainly not bound by that decree. I doubt not, there are caſes of baſtards taking by deſcription of the perſon: but the difficulty is, here are limitations over to all the other ſons and daughters: were theſe to be limitations in a ſucceſſion and ſeries of baſtards?

For plaintiff. It is proved, teſtatrix knew the ſituation of the defendant, and that there was ſuch a ſon; which makes it ſtronger than the reputed name of ſon, though that would be ſufficient. The words are applicable to no other perſon. She conſidered him as a perſon *in eſſe*, and under age; and it imports an immediate deviſe to him. Therefore though in general it is difficult to ſay, ſhe could thereby intend

intend to provide only for the baſtard iſſue of her daughter; yet, as ſhe knew of this eldeſt ſon, ſhe might make a ſeparate proviſion for him; and, if, afterward her daughter ſhould have legitimate ſons, might make a ſubſequent limitation to them: but the remote poſſibility of legitimate iſſue entered not into her view. The annuity ſhews, ſhe did not intend, defendant (whom ſhe knew to be her heir at law) ſhould have more. The right heirs were not to take, while one was *in eſſe*, to whom given before. It is like a limitation to heir at law after death of another; which is an implied gift for life to that other. *Vau.* The profits for maintenance ſeparate from the inheritance ſhews, ſhe meant a perſon *in eſſe*; and there are no words to ſhew ſhe meant it to a future perſon: nor would it be good in point of law; for a freehold cannot be given *in futuro*.

For defendant. Though defendant is not in a favourable light, the plaintiff is not capable of taking in conſtruction of law or by the intent. A baſtard in order to take, muſt be *in eſſe*, and have gained a reputed name, and then may take by deſcription: but there is no caſe, where under a general limitation, ſuch as denotes a firſt and every other ſon in the ordinary way, without a particular mark applicable to him and excluding all others. An intent muſt be ſhewn, that plaintiff ſhould take at all adventures againſt every one, although the defendant returned to *Lavarock*, and had legitimate children by him, or by any other after his death. The plaintiff could not contend with ſuch iſſue; and the conſtruction is the ſame though that event has not happened. In *Metham* v. *Duke of Devonſhire*, the Duke had by will made proviſion for the children of his ſon by Mrs. *Hennage:* there were words to take in all the children: Ld. *Macclesfield* held, it ſhould not be extended to thoſe born after the will: that the court never conſtrue teſtator to mean, his ſon ſhould continue in the ſame way, though it might be charity to provide for thoſe *in eſſe*; confining it to them; and held, it ſhould not even extend to a child *in ventre* at the time: and there was no queſtion of the perſons meant, as here. This general proviſion was to induce the defendant to return to another way; and was reaſonable; leaving the children then born to be provided for by defendant, as nature would oblige her to. Such a will as a prudent perſon intending to provide for her own blood would make; which could not poſſibly mean her baſe blood, and that for daughters alſo. Her knowing it turns the other way: ſhe muſt then have known his name; and would have mentioned it, if intended. In all laws, wherever ſon or child is mentioned, it always means legitimate: the *mulier* or legitimate, ſhall take againſt the baſtard. 1 *Inſt.* 123. *b.* *Dy.* 345. *a.* 2 *Rol.* 43. *Cr. El.* 510. 1 *Inſt.* 3. *b.*

LORD CHANCELLOR.

This is a matter of ſome difficulty; I will conſider of it therefore. It is very proper to ſee, if ſuch a cauſe could not be agreed in the mean time.

Which was afterward done by the parties.

Caſe 57. Morris *verſus* Dillingham, et e con, *Feb.* 20, 1750.

At the Rolls.

THE croſs bill demanded intereſt for arrears of an annuity or rent-charge. *Litton* v. *Litton*, 1 *Will.* 541. and Lady *Ferrars* v. Lord *Ferrars*. *Tal.* 2.

Intereſt of arrears of annuity diſcretionary on the circumſtances.

Againſt which it was urged, that intereſt is never given for arrears of an annuity, wherever it is diſcretionary on conſideration of the circumſtances; as where it was to exhauſt the fund for creditors, or to diſinherit an heir at law; both which circumſtances concurred here, and ſeveral circumſtances of hardſhip.

Sir *John Strange*.

The queſtion of intereſt is in ſome degree diſcretionary in the court: but not ſo arbitrary as to ſay the parties ſhall have intereſt or not juſt according to humour, but on the circumſtances; and the determinations of the court on queſtions of that nature if relative to the cauſe: otherwiſe no opinion could be framed of the rule of the court. If creditors may not be paid even their debts, if theſe arrears are paid with intereſt, that will have weight in ſome reſpects: but that does not appear in the cauſe, nor any thing as to hardſhip on an heir at law; and till that is made part of the cauſe, cannot be taken notice of.

The opinion of the court was reſerved on the interpoſition of counſel for liberty to introduce thoſe circumſtances.

Caſe 58. Earl of Stafford *verſus* Buckley, & others *Feb.* 23, 1750.

Not in Mr. Cha's York collect.

Annuity in fee, granted by K. out of Barbadoes duties, is not a rent, nor realty, nor within ſtatute of frauds, nor *St. de Donis*, but being ſettled on A. and heirs of her body, is a fee ſimple conditional at common law, the remainder over void, in caſe of a common perſon; and A. having had iſſue, may bar poſſibility of reverter.

RICHARD CANTILLON in 1724. made his will; firſt, reciting the proviſion made for his wife on their marriage, he ſays,

The grant of ... was out of the crown revenue of 4½ per cent at Barbadoes & the leeward islands. It was dated 19. July 24. Cha. 2. The first grantee was Wm Earl of Kinnoul, & the arrear was to him his heirs & assigns. The 4½ per cent duty for Barbadoes was granted by Cha. 2. by an act of assembly in Sept.r 17 1663 & was a duty of export, viz. that upon all dead commodities of the growth or produce of the island shipped off it for there should be paid four & an half in specie for every five score. Stake this account from the special verdict in Hall & Campbell ... reported in Cowp. 204. The same verdict the grants of a like duty of 4½ per cent duty for ... Christophers in 1663 extended in 1727 to the French part of that island, for Nevis in 1664, & for Antigua in 1668. But the verdict omits to state, when an act of assembly granted the like duty for Montserrat, which is to be the only other island ... to be part of Cha. 2. to Wm Earl of Kinnoul. However in the laws of ... for the act of Cha. 2. 1668. renews a former grant of the 4½ per cent duty to the

ſays; if there ſhould be any deficiency in that, it ſhould be ſatisfied out of his other effects: then, after giving ſeveral annuities and legacies, he ſays, " I hereby conſtitute and appoint S. and G. joint " executors of this will; praying them to ſee the ſaid jointure and " legacies paid;" and directs them to take care of the education of his daughter, to whom he gives 200*l. per ann.* until ſhe is married with their conſent, or come of age: then directs them "to intail on his daughter and her iſſue all the eſtate and effects, which ſhould belong to him, after payment of the aforeſaid jointure, annuities and legacies: but in caſe of her death and failure of her iſſue" he deſired them to divide it moietively between his two nephews; " My in- " tention being that the capital be laid out and ſecured and the " intereſt be made good to my daughter for life and to her lawful " heirs for ever, but in caſe of her and their failure, the ſame ſhall " go to my ſaid nephews moietively *as above*".

This will was not executed according to the ſtatute of frauds: it was made in *London*, but having gone to the *Indies*, and ſent for back again, it was very much damaged, and ſeveral blanks in it.

Lord *Stafford* having married the daughter with conſent of the executors, he and his wife brought this bill for the general purpoſe of carrying into execution the articles made precedent to their marriage, ſo far as they relate to the eſtate of the teſtator, in which Lady *Stafford* was intereſted; to have an account of that eſtate ſo far as it came to the hands of any of the defendants; and to have that and the real eſtate of teſtator ſettled, conveyed, and diſpoſed of according to the will and articles, and for that purpoſe to have ſeveral queſtions, made doubts between the parties, determined.

For plaintiff. Firſt, what is the ſubject matter of the will, and the eſtates to be governed by the directions to carry the will into execution? The teſtator left 1000*l. per ann.* granted by K. *C.* 2. out of the *Barbadoes* duties; as to which there are two points to be conſidered: firſt, whether it could paſs by the will? Next, if ſo, whether it is given? As to the firſt, it is a very particular caſe: it appears a grant of the profits ariſing to the crown out of the iſland of *Barbadoes* in reſpect of the ſovereignty of the crown over that colony; for it is not properly a rent, but a ſpecifick proportion of the produce of the iſland, and is paid to the crown in ſugar; being actually paid in *ſpecie*, the landholder not compounding for money. The grant is in conſideration of a ſurrender of a title claimed under letters patent to the *Caribbee* iſlands themſelves; Lord *Carliſle* having had from K. *J* 1. a grant of all theſe iſlands: but the colony ſucceeding, objections were made to that extenſive grant; which produced an accommodation, *viz.* a certain annual payment out of thoſe

thoſe very profits ariſing to the crown in reſpect of the ſeigniory of the iſland: but that was not quite effectual to the grantee, prior charges exhauſting it: therefore a new grant was made, which is now in force, to Lord *Kinnoul* and his heirs, introducing collateral ſecurity, directing payment to be made in caſe of deficiency out of any other of the King's revenue, as out of the exciſe, which the King might charge as much as lands of the crown, of which he was ſeiſed in fee. This grant in fee afterward came to the teſtator. The queſtion is, whether this is not real eſtate? Properly ſpeaking, it is not that, which lies in tenure: nor is it perhaps properly and ſtrictly a rent, becauſe that is money paid: but it is a profit *apprendre* out of the *Caribbees*, and is like tithes, which are part of the profits, and, if extraparochial, belong to the King *jure coronæ*. It certainly ſavours of the realty, being paid in reſpect of the tenure of the land, and incident to the ſovereignty, granted by letters patent of *England*, and cannot be granted otherwiſe. Where a dominion is held of the crown of *Great Britain*, though they have laws of their own within the ſeigniory, yet, wherever there is a grant of the ſeigniory itſelf, or of any thing ariſing out of the ſeigniory, which paſſes by the King's letters patent, and muſt be carried into execution in this kingdom; they are governed by the laws of *England*: as was held in the queſtion concerning the iſle of *Man*, as reported by Ld. *Coke*. Although this four and a half *per cent*. ſhould be raiſed by acts of aſſembly of thoſe iſlands, and therefore not compriſed in any of our civil liſt acts, it comes in lieu of the *reddendum* to the crown. To apply for the effect and benefit of this grant it muſt be by the letters patent to the King's managers here. According to the final determination in the bankers caſe an action would lye for it, *aſſiſe* or *diſtreſs*. An information in nature of trover would lye for the crown, as if the crown had the land itſelf. The ſame is held as to the *grand commotes* in *Wales*; the land within the *Lordſhips marchers* was governed by the particular laws there: but the ſeigniory itſelf was governed by the laws of *England*. Then this is ſubject to the laws in *England*, and ſo ſubject to the ſtatute of frauds. If this is a realty in *Barbadoes*, it may indeed paſs by this will, ſuppoſing the ſtatute of frauds does not by uſage take effect there; for uſage is a ground to receive it, though never enacted. But if it is a realty in *Barbadoes*, yet, being payable in *England* out of that duty, it is a realty in *England* alſo, and ſo within the ſtatute of frauds. Though the word hereditaments is not in the ſtatute, if therefore it ſhould be held to extend no farther than lands or tenements, it would deſtroy ſeveral deviſes: for advowſons, rents, tithes, fairs or markets, have been held within that ſtatute; becauſe the ſtatute is co-extenſive to, what is called real eſtate. The grants by King *Charles* II. to his natural children were payable out of the hereditary exciſe granted to him by parliament, and ſo, much leſs ſavouring of the realty than the preſent caſe: yet though they have not been determined to be real

eſtate, they have been conſidered in that light, and ſettled as ſuch. A very little matter will make theſe inheritances real eſtate; as titles of nobility, by virtue of the place inſerted in their patents; and ſo within the ſtatute *de donis*. But ſuppoſing this a perſonal annuity in fee, and not to be conſidered as a rent charge or any rent iſſuing out of any ſort of land, the queſtion is, whether the teſtator has given it? It is plain, he has not; for he has given nothing whatever to his executors by words of bequeſt; only directing what they ſhould do with that which veſted in them as executors *eo nomine*; and nothing but that did he mean they ſhould intail. Then, ſuppoſing this to be perſonal, it cannot go to executors, though the teſtator might perhaps diſpoſe of it as an hereditament, he was proprietor of. Though there cannot be a recovery of it, becauſe it is not real, yet has it a deſcendable quality. An annuity in fee deſcends to the heir. It may in one ſenſe be intailed; as it may be granted to one and the heirs of his body; where the condition would not be performed, unleſs iſſue had: but it is not properly that, which would veſt in executors as ſuch. Nor does teſtator ſeem to have had it in view; the eſtate, he ſpeaks of, meaning a capital to be laid out at intereſt; which could not be the capital of this annuity. Teſtator had an eſtate in *France* as well as *England*, and knew, what veſts in executor, *hæres in mobilibus* by the *Roman* law. This would not be aſſets for debts. Nothing, which goes to the heir, is applicable to debts, unleſs the heir is bound. A bond or covenant debt is to be paid out of a real eſtate, becauſe the heir is to pay it; not that it binds the real eſtate.

The queſtion then is, what ſettlement is to be made of this groſs perſonal eſtate. Nothing happening ſince death of teſtator can vary the right. The ſettlement now muſt be ſuch, as would and ought to be made juſt after his death; and then the intereſt of the remainders would be out of the queſtion. To ſee what that ſettlement ſhould have been by the executors, in whom the whole legal eſtate veſts, firſt what was the clear intent of teſtator? Secondly the conſequence of that in law and equity? Thirdly, ſuppoſing there are ſome words, which though uſed by teſtator conſiſtent with his own intent, yet the court may lay hold of to reſtrain the ſettlement on his daughter, how far it is to be reſtrained, and in what manner? His real intention was plainly a perpetual intail. It does not appear through his whole will, he had a notion of any rule of law or equity to prevent it. The word uſed is intail; which is a technical term, uſed elſewhere as well as here, but introduced here by the ſtatute *de donis*; meaning a particular ſort of ſucceſſion in a particular channel, not to the heirs in general. The word following has the ſame meaning, iſſue, as a word of limitation, becauſe to take indefinitely, it is iſſue for ever. Then ſuppoſing her iſſue ſhould fail, (which is that iſſue to whom before limited) he grafts a remainder on it, when ever that failure ſhould be. Then by the rules of law and equity ſuch a

limitation is void: though perhaps in the original there might be no great reaſon, why it ſhould not be made good *cy pres*, yet as to perſonal things the rule is, wherever teſtator intends a perpetual ſucceſſion to the iſſue of any one, a remainder afterward is abſolutely void. The rule is the ſame in equity. Its being on truſt will not vary it: it was ſo held on Sir *Richard Groſvenor*'s will. In Lord *George Beauclere* v. Miſs *Dormer* the deviſe was, "I make Miſs *Dormer* my univerſal heir "and executrix; and if ſhe dies without iſſue, then to go to Lord "*George*: Your Lordſhip held it to be void. The queſtion there was, how it ſhould be conſtrued? For if as an indefinite failure of iſſue, the court would not make it good *cy pres*; as they might, if a failure at the time of the death. In that great queſtion of the double contingency, where the ſettlement of the perſonal was to go with the real eſtate to one for life, remainder to the firſt and every other ſon in Tail, and for want of ſuch iſſue, over; all the old caſes (ſeveral of which are in *Pollexfen*) held the limitation over void; and until *Higgins* v. *Dowler* * that was not doubted: but there it was in an *obiter* opinion of Lord *Cowper*, and the diſtinction introduced of a double contingency. The Maſter of the Rolls held, that if teſtator meant a perpetual ſucceſſion, it could not be made good *cy pres*: ſo did Lord *Talbot* in *Clare* v. *Clare*. * It came before your Lordſhip collaterally only in *Leviſon* v. *Groſvenor*, where it was not neceſſary to the determination; *viz.* "I deſire my truſtees to limit this, as the real eſtate is limited, as far as may be by law and equity:" your Lordſhip held, that was a particular caſe from the reference to ſettle according to the rules of law and equity: but that, without being bound on the general queſtion, there was good reaſon in the diſtinction of the double contingency taken by the Maſter of the *Rolls*; who conſidered it thus: to his firſt ſon, if he has a firſt ſon, but if no firſt ſon, then over; that one of the contingencies being good, the other bad, the limitation over will be ſupported by that contingency allowed by law, being within a compaſs allowed of. But your Lordſhip would not be bound by that, but clearly held, if ever there was a ſon, though born but for a moment, there was an end of the limitation over, it could not be made good *cy pres*, though there was a way of doing it, but muſt be attended with the conſequences, when the teſtator had limited in perpetual ſucceſſion. In the preſent caſe there has been a child, a daughter, (though now dead) in whom it veſted, and ſo an end of the remainder over; although that child's intereſt might be deveſted on the birth of a ſon, yet till the eſtate opened, it was an actual veſted intereſt, and prevented the remainder over from ever taking effect, as much as if void *ab initio*. But ſuppoſing (which is the 3*d* conſideration) there are ſome words, the court may lay hold of to turn iſſue into a word of purchaſe, what ſort of ſettlement is to be made on the iſſue as purchaſers? If to take as purchaſers, it muſt be either by analogy to proper intails, (which teſtator ſeems to have in view) *viz.* the firſt and every other ſon,

* 1 Will. 98. Sal. 156. 2 Ver. 600.

* Tal. 21.

ſon, and on failure to daughters, or all of them to take generally: if the firſt way, it muſt wait for the death of Lady *Stafford* for thoſe children to be born of her. The contingency, on which the remainder over is limited, cannot be allowed, nor is there any thing for the court to lay hold on to make it good *cy pres*. If all were to take as purchaſers, it muſt wait, till it is ſeen what children there are: but it will veſt as ſoon as born, for they muſt take abſolutely, unleſs words are found confining it to thoſe living at time of the death, for otherwiſe the court will not do it: as your Lordſhip held in Miſs *Dormer*'s caſe, where the adverb then was held too little to lay weight upon: nor would the word living do. Here the limitation over is not to take effect till a failure abſolutely of her children; which would give her an eſtate tail; and then the limitation over is void according to *Higgins* v. *Dowler*. If it had been land deviſed to her for life, remainder to heirs of her body, it is never held otherwiſe than an eſtate tail, unleſs where there has been a truſt, which muſt be executed, or that the words of the will ſhewed clearly, the firſt taker ſhould have an eſtate for life only, which is not ſo here, *Bagſhaw* v. *Spencer* was determined by your Lordſhip on other principles; that it was a clear intent to give the firſt taker an eſtate for life; and alſo that it was a truſt to be executed; though not directed to be ſo; and therefore you put an end to the diſtinction, which had been made; becauſe all truſts are executory: and there were other words, none of which are here.

Next whether plaintiff is intitled to profits of this eſtate from death of her father; it being contended, that till her attaining twenty-one or marriage with conſent, they are to accumulate for remainder-men, whoever they ſhall happen to be, when capable of taking; for that till the jointure, annuities, *&c.* determined, it cannot appear, what is to be intailed: but that objection ariſes from too narrow a conſtruction of the word after, which means ſubject to the payment of them: for one of the annuities is in fee; and it is impoſſible, when he intended, it ſhould be intailed on her and her iſſue, he could mean, the ſettlement ſhould wait till determination of that or of the jointure.

For defendants the nephews. The 1000 *l.* annuity, if given by the will, paſſes thereby notwithſtanding the nature of the ſubject of the grant, and the formalities required by the ſtatute of frauds. The nature of the thing may properly be illuſtrated from the remedy, the law gives for it; the conſtant method of *Fitzherbert* and *Coke*. The remedy in this caſe is merely perſonal, againſt the perſon of grantor, or his heir on account of aſſets deſcended; a writ of annuity, no aſſize or diſtreſs, it not ſavouring of the realty; therefore different from a rent charge: which gives the ſame remedy, that lies for the land itſelf: ſo that there is nothing from the nature of the thing to prevent its paſſing by the will. Thus in the grant of a common perſon:

nor

nor is there any difference in the caſe of the crown. The king cannot indeed be charged in his perſon; which, the mirrour ſays, is an abuſe of juſtice, that writs ſhould not lye againſt the king as well as others: but that is from the neceſſity, the law ſubſtituting a petition of right inſtead of a perſonal election: no difference from thence in the nature of the thing itſelf; nor from the fund out of which it is payable. The argument of its coming in lieu of the iſlands themſelves, and therefore of the ſame nature as what it comes in lieu of, proves too much; for that would prove, that money coming in lieu of it ſavoured of the realty. *Smith* v. *Boucher*, *Hob.* 248, ſhews, the addition of the fund, out of which the annuity is to be paid, was not to furniſh any argument as to the nature of the grant, but for benefit of the grantee to point out where he is to go to receive it. This is by no means within the ſtatute of frauds; the conſtruction of which the court will not incline to extend; as it is an incapacitating clauſe, diſabling the owner from doing that which he might do.

LORD CHANCELLOR.

That ſtatute has certainly received the moſt liberal conſtruction.

In *Aſhburnham* v. *Kirkall* the judges conſidered the *Mortmain* act as going to diſability of that ownerſhip, the owner of the land had; and one caſe, they relied on, was in *Sid*: on the ſtatute of frauds. This is very different from the caſe of tithes; for which an ejectment will lye. Even in the caſe of corn-rents reſerved on a leaſe if one was to deviſe, that a debt ſhould be paid out of the money, when it came into his receiver's hands, it could not be conſidered as ſo ſavouring of the realty, as that the will muſt be accompanied with all the requiſites in the clauſe of that ſtatute. Several inſtances muſt have been, where the owner of an annuity has done ſo: yet no caſe is cited for that purpoſe. But if it be a realty, it muſt be conſidered as ſuch in the place, from whence it came: and though ſaid to be the ſubject matter of letters patent in *England*, that will not go ſo far as to make it conſidered as real here. But 2 *Wil.* 75, puts this out of the caſe. Next whether teſtator deſigned, or has done ſufficient, to paſs it? Though no direct diſpoſition of any thing to the executors, the precedent part of the will ſuppoſes neceſſarily the whole fund to be in them. This then is an implied gift to them; and would carry every thing, except ſuch as either the nature of it or the want of formalities in the will would prevent; for that impediment would prevail, even if there had been an expreſs deviſe to the executors. He had his general eſtate and effects in contemplation; and it would be very extraordinary, that he ſhould omit ſo conſiderable a part of his property. As to the conſtruction of the limitation, his daughter is made tenant for life, or to have the uſufructuary intereſt of this perſonal eſtate for life, with a gift over to her

her iſſue, ſuch as ſhe ſhould leave at time of her death: but if ſhe died without iſſue living at the time of her death, then over to his nephews. To conſtrue it a tenancy in tail in the daughter the court muſt reject the words added in explanation. There is no inſtance, where ſo reaſonable a foundation to connect the ſubſequent to the former words, and make both relative to one point of time, that the court does not confine it to the time of the death. *Atkinſon* v. *Hutchinſon*, 3 *Wil.* 250, and the court makes large conſtructions for that purpoſe. *Forth* v. *Chapman* 1 *Wil.* 663. Miſs *Dormer*'s caſe, your Lordſhip held, was a flat intail without any words to lay hold of to confine it to the death; which the court is induſtrious to find out to prevent it's being a void limitation. Subſequent facts may and ought to be taken into conſideration; for this was no immediate deviſe of any thing, but ſuch as required to be carried into execution by intervention of a court of juſtice. Although Lord *Talbot*'s opinion in *Clare* v. *Clare* was on a ſuppoſition, that the court could not take into conſideration ſubſequent events, yet in the very next year in *Hopkins* v. *Hopkins* he himſelf declared and founded his opinion upon not only the poſſibility but propriety of the courts doing it. The double contingency is out of the caſe by the birth of the daughter: nor will that make any difference.

As to the accumulation of the ſurplus profits above the 200 *l.* maintenance till the daughter's marriage, the queſtion is, whether they are part of the intereſt or of the capital? They are part of the capital: otherwiſe the direction about the maintenance is nugatory, if ſhe was to take the whole of the intereſt abſolutely. They will be conſidered therefore as part of the general fund, which teſtator has directed to be preſerved, and go accordingly.

LORD CHANCELLOR.

The firſt queſtion made is, whether this annuity is to be conſidered as in nature of a rent and to partake of the realty, or as a mere perſonal thing to a man and his heirs inheritable according to ſuch rules of deſcent, as the law allows to ſuch perſonal things? And that in order to introduce another queſtion, whether or no it could paſs by a will not executed according to the ſtatute of frauds? I am clearly of opinion, it is a mere perſonal annuity, having no relation to lands or tenements, or partaking of the nature of a rent by any means. Firſt, this would be ſo, if the fact was, as the plaintiffs counſel endeavoured to repreſent as to this duty of four and a half *per cent.* but the fact fails them. Suppoſe, it had been in the ſtrongeſt manner for the plaintiff, *viz.* that King *Charles* I. had granted theſe iſlands to Lord *Carliſle* with a reſervation of a ſtrict rent of four and a half *per cent.* in ſpecie on the product of the iſlands, and afterward King *Charles* II. had granted 1000 *l. per ann.* in money out

The annuity held to be clearly a mere personal annuity. Note, that this day Sir Lloyd Arden Master of the Rolls decided a case of navigation bonds which he held to be real estate & not devisable without a will by 3 witnesses. The name of the case is Backbridge v. Ingram. He distinguished it from the case here. M. P. 22. July 1795.

Part of a rent may be granted, not a new rent reserved or granted out of the old.

of the produce of that rent to Lord *Kinnoul* and his heirs: this would have been a mere annuity, even ſuppoſing that had been the caſe, becauſe a rent cannot be reſerved or granted out of a rent. Part of a rent may be granted indeed: but a new rent cannot be reſerved or granted thereout, becauſe no diſtreſs can be or aſſize taken of it, as there is nothing to be put in view of the recogniſors of the aſſize; which, the rule is, is neceſſary, and has been ſo determined. Conſequently if the four and a half *per cent.* in ſpecie had been a rent like a corn-rent, this would not have been a rent; for this money to be paid out of that produce is another thing, and cannot be taken to be part of the old original rent, which was reſerved in ſpecie: but this not like it. Conſider the laws of *Barbadoes* (which is the principal, and, I believe, the reſt of the *Leeward* iſlands fall under the ſame rule) and the act of aſſembly, by which this is granted. It is in the expreſs words of the grant a cuſtom or impoſt, a duty on exports from the iſland, and no reſervation out of the iſland, though it ariſes out of the produce: ſo that it has no relation to the caſe endeavoured to be made of it. Conſequently this annuity in fee is a perſonal inheritance, what the law ſuffers to deſcend to the heir, but has nothing to do with the realty, as appears from *Co. Lit.* 20, and ſo not within the ſtatute of frauds; for lands or tenements only are within it. An advowſon comes indeed under that deſcription; for it may be held under *knight ſervice*; and rents partake of the nature of land, follow that, and conſequently are all within that ſtatute: but nothing is within it, which is not a real right or intereſt, or partaking of the realty; as this annuity is not, though granted in fee.

Advowſons & rents within ſtatute of frauds, but an annuity in fee not a perſonal inheritance.

See Atk. Rep. 779. & 367.

The firſt remaining conſideration is, whether this, which appears to be a perſonal annuity in fee, and conſequently a perſonal inheritance deſcendable to the heir, is included or compriſed in the will, ſo that the executors have an intereſt in or power over it; for it may be either way. The ſecond conſideration is as to the limitations to be made; how far by this will they may take effect, or are too remote.

The annuity held to be comprized in the will.

Note that in an opinion of Mr. Booth dated 4. April 1743 he mentions, that in a ſchedule in the teſtators own hand writing, proved with his will the annuity in queſtion is enumerated as a part of his property by the name of the Barbadoes annuity.

As to the firſt, I think, it is a queſtion of ſome doubt: and yet I do not know, that it will be of conſequence between the parties. There are to be ſure no words deſcribing or giving it: nor has teſtator given any part of the real eſtate: nor could it be deviſed, if named; becauſe not executed according to the ſtatute of frauds. As to his perſonal eſtate, he has made no particular legacy of the reſidue of the perſonal ſo as to include perſonal things which would go to executors; much leſs perſonal things which would not go to executors, but are deſcendable to heirs according to a courſe of deſcent the law allows of as to that: but here are words, that point that way, *viz.* eſtate and effects, which are made uſe of more than once in the will. Where he intends to make a ſatisfaction to his wife for the deficiency of her

proviſion on her marriage, he does it out of all his other effects; which words would have been ſufficient to have charged any eſtate of his, that could paſs by this will, whether ſuch as is ſtrictly perſonal and aſſets in the executors, or ſuch perſonal as was deſcendable to the heir; therefore ſufficient to have charged this annuity to have made ſatisfaction to the wife, if occaſion to reſort thereto; becauſe there was a clear intent to provide a fund for that purpoſe, and that annuity would have paſſed by this will, if ſpecially named. This is only an obſervation, not concluſive, on the nature of the will and uſe of the word effects. In the clauſe creating the preſent queſtion he has given nothing to the executors, nor made them reſiduary legatees in truſt; and therefore nothing veſts in them, but what properly does ſo by naming them executors. All the reſt of the perſonal eſtate, that could paſs to executors, would go to them: but this is a kind of perſonalty, which according to *Doctor and ſtudent* would not be aſſets in executors, and conſequently will not go to them by being named executors. The queſtion is, whether on theſe words to intail on her *&c.* compared with the former part, there is ſufficient to paſs by words or implication this annuity to the executors, or whether there are not words ſufficient to give them power to convey. It is too much perhaps to ſay, that theſe latter words are ſufficient to paſs any intereſt to them, provided that did not paſs by naming them executors; which it did not: but why ſhould it not give them a power to convey? For one may give a naked power to executors to ſell or convey, *&c.* without giving any thing to them. Conſider the words. The word eſtate is the moſt general, that can be uſed; and according to all the caſes ſufficiently compriſed all kind of eſtates; eſpecially when by ſaying eſtate and effects he points at both real and perſonal; and therefore I do not ſee in point of law or reaſon, why, if this will had been executed according to the ſtatute of frauds, theſe words would not have enabled theſe executors to have ſettled his lands in *England*; for it was his intent, theſe executors ſhould be his truſtees for that, and make a ſettlement of his whole eſtate; eſpecially when it is ſaid, after payment of the aforeſaid jointure, *&c.* which carries me back to the obſervation of the direction to make good the jointure; and therefore this direction to the executors is as large as that charge before. If then within this power lands would have been included, provided the will had been executed according to the ſtatute (for at this day a man cannot give a power to his executors to ſell his lands by a will not executed according to the ſtatute) I ſee no reaſon, why this annuity is not compriſed; the words being general enough to take it in; and nothing in the nature of the eſtate preventing its operating upon it. I incline therefore, that the executors have power to ſettle this annuity.

Annuity in fee goes not to, nor aſſets in, executors.

Naked power to executors to ſell or convey.

Extent of the word eſtate.

Which leads to the next queſtion: ſuppoſing this annuity is included, and it is not doubted, but the reſidue veſts in the executors *eo nomine*, in what manner that it is to be ſettled, and how far the limi-

limitation is to take effect? I will conſider this in two lights: firſt as to the annuity, which is not a perſonal thing to veſt in executors *eo nomine*: next as to the ſurplus, which is merely perſonal, and would veſt in them by virtue of making them executors.

The annuity held to be paſs to Lady Hyde and by way of conditional fee, & the heirs of her body to be alienable.

1 Will. 663.

Different conſtruction on ſame clauſe according to nature of the eſtates.

As to the annuity, I think, it will fall under a different conſideration from the reſt of the perſonal eſtate. If eſtates of a different nature are compriſed in this clauſe, *Forth* v. *Chapman* is an expreſs authority for me, that the words ſhall receive a different conſtruction according to the nature of theſe eſtates. Suppoſing therefore land was compriſed in the direction of the truſt, and the will ſo executed as to have affected lands, the court could not poſſibly have directed any other ſettlement of the land but to the daughter in tail. Undoubtedly ſo, if it had ſtood on the firſt words to intail on her, &c. How is it explained by the ſubſequent clauſe, wherein the teſtator has declared his own intent, and made the conſtruction himſelf? There it would have been a direction, the ſettlement ſhould be on her for life: but ſaying her lawful heirs for ever, will be conſtrued by the preceding word *iſſue*, which will make an eſtate tail in her. So it would be as to land: the queſtion then ariſes as to this particular inſtance of annuity; which is not real, but an inheritance of a perſonal thing deſcendible to the heir. The proper kind of limitation that is capable of, is diſtinct from mere perſonal goods and chattels. The teſtator, having purchaſed it, was ſeiſed in fee of it at the time of making the will; and might direct it to be ſettled as far, as by law allowed to be ſo; not by way of ſtrict intail; becauſe not within the ſtatute *de donis* according to Lord *Coke*. No writ of entry could be brought of it: nor is it real eſtate: and the very ſtatute itſelf ſhews it in the beginning of it, nothing being included therein but lands and tenements and what partakes of their nature: and *Co. Lit.* 20 ſays, in all theſe caſes grantee has a fee conditional as before the ſtatute. The ſettlement then to be made of it, ſuppoſing the firſt queſtion that it is included in this power in the will, is in this manner; to the daughter for life and the heirs of her body; which is in her a fee ſimple conditional. The executors then clearly could not carry it over in remainder to the nephews; for no remainder could be created of any eſtate not within the ſtatute *de donis*; for before it was a poſſibility of reverter, out of which a remainder could not be, upon this notion, that being but a poſſibility it could not be grantable over: and if before the ſtatute *de donis* a man had granted lands to another and the heirs of his body, and ſaid in default of ſuch iſſue over to *B.* and his heirs, that grant over had been void, and on the having iſſue the condition had been performed, and the grantee himſelf might have aliened ſo as to have barred the poſſibility of reverter. So here as this annuity is not within the ſtatute *de donis*, if ſettled according to this will to her for life and the heirs of her body, if carried over in default of ſuch iſſue to the nephews, that would have been void: as ſoon as iſſue had, the condition is performed; ſhe might have aliened, and barred the poſſibility of reverter to the donor.

Lands and tenements only within ſtat. de donis.

No remainder ove of eſtate not within that ſtat.

Poſſibility not grantable over except by K.

donor. Here iſſue has been had; and conſequently an abſolute fee muſt be, if a ſettlement is made according to this will. This I take to be the legal conſtruction of this deviſe according to the different nature of theſe eſtates: and this (for I would not be miſunderſtood) will not affect thoſe grants, to which this has been compared, which have been frequent, of annuities by the crown of this kind with remainders over; for though a common perſon cannot grant a poſſibility, the crown can; as it may grant a *choſe in action*; and according to *Miles* v. *Williams*, 1 *Wil.* 252 (which is truly reported) his grantee may ſue for it in his own name; although a common perſon cannot grant a *choſe* in action ſo as to enable grantee to bring an action in his own name. I do not take it, that before the ſtatute *de donis* the poſſibility of reverter in the crown could be barred; which differs all theſe grants of the crown from caſes of common perſons. Therefore on the directions in this clauſe, if a ſettlement had been made, the executors muſt have ſettled it to the daughter, and the heirs of her body ſo as to be a fee conditional with a power after iſſue had to alien, and prevent poſſibility of reverter.

Grantee of choſe in action by the King may ſue in his own name, not ſo of a common perſon.

As to the reſidue, which is merely perſonal, it is different; for according to *Forth* v. *Chapman* a different conſtruction may be put on the ſame words in reſpect of eſtates capable of ſuch a limitation in tail, and of thoſe not capable of it: and I am of opinion, that the limitation contended for by the nephews is not ſo, nor was that the teſtator's intent, nor are the words capable of that conſtruction, *viz.* that the daughter ſhould have an uſufructuary intereſt for life, *&c.* This muſt be conſidered of perſonal effects merely. The firſt words, taken with the explanation afterward made, ſhew *iſſue* meant in the ſame ſenſe as *heirs*, and has the ſame conſtruction in wills according to all the caſes, and that of Miſs *Dormer*; in which I held, that even where the firſt limitation was not for life, but to *A.* and if *A.* dyes without iſſue, over to *B.* that was too remote, becauſe it was a failure of iſſue *in infinitum*, and that I could not be warranted to ſay, theſe words muſt be tied up to a dying without ſuch iſſue or without heirs at time of the death. Here are not any words to change *iſſue* from the common and legal conſtruction; for I do not ſee even in the ſubſequent words, which are inſiſted on, any thing to reſtrain the failure of iſſue to the time of her death: but, let them fail at any time, the meaning was, it ſhould go over. Here it is expreſsly given to the daughter for life; which words muſt be taken into conſtruction of the firſt part, and explain them. In the former part he has explained his own meaning to be to make a ſettlement of this money to the line of heirs of the body of his daughter in perpetuity; which intent, or of the limitation over afterward, the law will certainly not admit: nor was any thing

Perſonal effects not to be given in perpetuity to heirs of body; and remainder void.

farther from his intent than to confine it to a dying without iſſue at time of her death. Conſequently it is too remote, and the nephews can take nothing. But though bad as to the nephews, it may be good as to the iſſue to veſt the property in them: but reſerve that queſtion (which however does not concern the annuity) till after the report.

The only remaining queſtion is as to the profits contended to be accumulated. I am of opinion, the true conſtruction is, that it is *ſubject* to the aforeſaid annuities, *&c.*; one of which was in fee. Nor does teſtator import, that the 200*l.* was all, ſhe ſhould have: and there are ſeveral inſtances, where a particular ſum is directed for maintenance, and afterward a ſettlement to be made notwithſtanding; the 200*l.* being only directed by her father to reſtrain, what ſhould be for her maintenance. The profits therefore over and above the maintenance, go and belong to the plaintiff.

The 1000*l.* annuity and the ſurplus of the perſonal eſtate are ſubject to the power given to the executors; and the annuity, being capable of a limitation to the daughter and the heirs of her body, did by virtue of the will veſt in her as a fee ſimple conditional at common law; and ſhe, having had iſſue, is capable of aliening or ſettling the ſame; and the limitation over is void.

Note. *Snell* v. *Read*, 5 *Auguſt* 1743, was cited at the bar: a deviſe of a chattel intereſt to truſtees to ſettle on his daughter and heirs of her body, but if ſhe ſhould dye leaving no heirs, then over: the deviſe over held good.

And alſo the caſe of the *New river company*; which Lord *Chancellor* ſaid, was of ſo much land *Aquâ coopert'*: but there was no act of parliament altering the nature of them; and they are forced to levy fines in all the countries, though which the river runs.

Case 59.

Vaughan *verſus* Farrer, *Feb.* 26, 1750-1.

Mortmain, St. 9 G. 2. Expreſs eſtate for life not enlarged by implication, unleſs neceſſary, as to preſerve intent for the line in ſucceſſion.

JOHN ALLEN deviſed all the reſidue of his real and perſonal eſtate to the defendant for life: but in caſe ſhe married, and left children at the time of her death, the whole to ſuch child or children: but if ſhe ſhould dye without iſſue, then ſhe might diſpoſe of 500*l.* by will or deed in writing to ſuch uſes, as ſhe ſhould think proper: but in default of ſuch iſſue, and for want of ſuch diſpoſition, truſtees ſhould erect, in ſome convenient

place in or near the city of *York*, an hoſpital for the ſupport and maintenance of as many poor old men, as the ſurplus of his eſtate and effects would admit of, and to put in as many as they ſhould think proper in their diſcretion.

Dying without iſſue, as to perſonal eſtate, conſtrued in the vulgar ſenſe, to preſerve the limitation over.

The plaintiff brought this bill as heir at law and next of kin of teſtator to have the will tried, and ſet aſide on fraud and impoſition on teſtator: but if the will ſhould be good, then to have the benefit of the charities deviſed therein contrary to the ſtatute of *Mortmain*.

Wills, to be found void in court of law on fraud.

It was inſiſted, this court would not ſet it aſide without having it tried; that it was now ſettled, that courts of law would go into the conſideration of fraud in a will, and had been done ſo lately ſingly on the head of fraud in *Fenwick* v. *James* on an iſſue directed by his *Lordſhip*; wherein the jury aſked *Lee*, Chief Juſtice, if they could find it void for fraud; who anſwered, they could.

But the trial was now waved.

For plaintiff. The remainder over to the charity is void as to the perſonal as well as the real; being expreſsly directed to be laid out in doing that, which cannot be done without purchaſe of land to erect the hoſpital upon, and that in perpetuity. Money cannot be deviſed to be laid out in purchaſe of a leaſe for years. It is doubtful, whether a leaſe for years can be deviſed in that manner: it was doubted in a cauſe, which was compounded. Every queſtion on this ſtatute is of publick importance; ſeveral attempts being made to get out of it. The view was not only to prevent ſo much land being *Mortmain*, and very far from preventing charity in general, but improvident alienations juſt before death, recited as one ground in the preamble; the legiſlature meaning not to leave that method of diſheriſon open by deviſing vaſt ſums to be laid out in buildings. There is no authority ſince the act, which will warrant perſonal eſtate to be laid out in erecting a building. There was a caſe of money given toward the foundation of a ſchool and teaching, where your *Lordſhip* held, *foundation* had a figurative as well as literal ſenſe, and did not mean building; and therefore by ſhewing it did not neceſſarily imply building, held it might be taken out of the letter of the act: but it is impoſſible to take this ſo, which muſt mean building and a purchaſe of land. There it was of abſolute neceſſity to conſtrue it ſo, that the will might have any effect, as there was no proviſion for the maſter's ſalary; and in the ſame manner would the court have directed, had the queſtion been before the ſtatute. The ſame judgment muſt be given now, as

would

would be before the ſtatute, when the court would have directed part of this money in purchaſe of land and building on it, and the reſt in land for the endowment and maintenance: then a different conſtruction will not be made to evade the ſtatute. This was attempted in a late caſe *, where ſubject to debts and legacies real and perſonal eſtate were deviſed to a charity: it was inſiſted, that as the intent was clear the charity ſhould be ſupported, it ſhould be done by new marſhalling the aſſets by turning the debts, &c. upon the real: your *Lordſhip* held, it could not be done, nor a new rule introduced ſince the ſtatute to evade it, though by that way there might have been a fund for the charity. In the caſe of Sir *John James*, teſtator directed land to be ſold, and the money ariſing as a fund for a charity: your *Lordſhip* held it void within the ſtatute; that it was an intereſt in land then; and alluded to *Roper* v. *Ratcliff*, where ſo held on the popery acts. This is not like thoſe caſes where money is to be laid out in land or ſtock, in which the court will lay hold of the good alternative. There ſhould at leaſt be an inquiry into the nature of this perſonal eſtate; for if any of it is ſecured by mortgages, they are intereſts in real eſtate, and would not paſs. If teſtator had given a mortgage for erecting this charity, that would not be good, becauſe an incumbrance affecting land: and if that money is not paid, by the courſe of equity the eſtate muſt be foreclоſed, and the land veſt in the truſtees. In *Att. G.* v. *Meyrick*, 6 *November* 1750, money due on mortgage was deviſed: on a bill by the truſtees to eſtabliſh the charity the heir at law ſaid, he would not ſuffer a foreclоſure, but was ready to redeem: *The maſter of the Rolls* held this within the ſtatute, an intereſt affecting land, and diſmiſſed the bill.

* *Mogg* v. *Hodgis*, 16th *November* 1750.

For the charity. The real eſtate is very ſmall, and not diſputed by the charity. As to the perſonal, this court, on a doubt whether an interlineation was part of a will or not, gives liberty to apply to the eccleſiaſtical court to try it as to that part: but never *in toto* directs it to be tried in eccleſiaſtical court. Though the ſtatute is ſo far made againſt charitable diſpoſitions, yet if this breaks not in on the meaning of that ſtatute, the court is bound to conſtrue it for the charity as much as poſſible; which favour for charity in deeds or wills is eſtabliſhed, ſo that a thing not paſſing in point of law, ſhall paſs. Though the building muſt be erected on land, it is not neceſſary that it muſt be purchaſed; if it may be effectually done without it. If any perſon will now by deed give a piece of land to build the hoſpital upon, the truſtees might build on it. So if one of the truſtees will give it. Erecting does not neceſſarily mean building, but founding; putting it on ſuch a foot that the end may be anſwered; which was not for the ſake of the building, but that out of the produce theſe

theſe poor might be maintained; and a houſe might be hired for that purpoſe, as is commonly done by church-wardens. In *Gaſtril* v. *Baker*, 31 *March* 1747, teſtator's repreſentatives brought a bill for reſidue of perſonal eſtate undiſpoſed by will againſt the truſtees, who were alſo executors, and who claimed it for a charity in the will in theſe words: "I give all the reſt and re- "ſidue of my eſtate of what nature ſoever to truſtees, in order to "and towards erecting a ſchool for the education of poor boys "in ſuch a place, in ſuch a manner, as the truſtees ſhould direct "and appoint." It was inſiſted to be a lapſed legacy by the *Mortmain* act, and that erecting a ſchool muſt mean buying and building. Your *Lordſhip* held, that erecting included the found- ing, and conſequently the maintenance of the maſter; which was a different thing from the mere ſchool-place itſelf: but that the end might be obtained by hiring a houſe, and directed ac- cordingly; and this for ever. The maſter's maintenance there was included, though not expreſsly directed, as it is here. If this was already an eſtabliſhed charity and actual land, but no build- ing, and this perſonal eſtate deviſed in building thereon, the ſtatute would not extend to it. This muſt be conſtrued ac- cording to the common law, which is in favour of charities, and therefore ſtrictly; ſo that the mere building is not within it. It naturally runs into a perpetuity, as alſo in the caſe of the ſchool, though not ſo expreſſed by teſtator: the maintenance at leaſt may be independent of the purchaſe of land. *Attorney General* v. *Meyrick* was conſidered as a charge on land, within the prohi- bitory words of the act. In *Sowerſby* v. *Hollins*, teſtator deſired executors in ſix months to ſettle and ſecure by purchaſe of lands or otherwiſe, as adviſed, an annuity of 50*l.* to be diſtributed a- mong the poor inhabitants of *Leeds:* the ſame objection was made: the court ſaid, there was a latitude, and, *ut res magis valeat*, would not take from the charity that way, in which it might be done conſiſtent with law, and ordered the fund for that to be taken out of the perſonal eſtate.

For defendant, Mrs. *Farrer*. This deviſe creates an eſtate tail to her by implication both as to the real and perſonal; and then the limitation over as to the perſonal is too remote, the whole veſting in her. *Love* v. *Windham*, *Sid.* 450, and *Dormer* v. *Beauclere* *, that notwithſtanding expreſs limitation for life, if on a general failure of iſſue without words to confine it to time of the death, it carries compleat ownerſhip of perſonalty. There are indeed words to that effect here: but in a diſtinct part, not an- nexed to the limitation itſelf.

* Cited in pre- ceding caſe.

LORD CHANCELLOR.

As the plaintiff heir at law, declines to try the will as to the real, and as it is eſtabliſhed in the Eccleſiaſtical court as to the perſonal, there is nothing to determine on but the conſtruction; and if no right appears, on which I can found a decree for the plaintiff, the bill muſt be diſmiſſed: and as to any queſtion between co-defendants or direction for the charity, though the *Attorney General* is made a party, I ſhall not be warranted to give any direction, nothing being now before me but the bill by plaintiff as heir and next of kin.

As to plaintiff's demands, (taking the will to be well executed, as I muſt now) I am of opinion againſt the defendant *Farrer* as to the bars inſiſted on both as to the real and perſonal. As to the real, an eſtate tail by implication does not ariſe to her: firſt there is an expreſs deviſe for life to her; and the general rule is, that in ſuch caſe that particular eſtate, ſo limited by proper, expreſs, and technical words, ſhall not be enlarged by any implication by ſubſequent words, unleſs that implication is of abſolute neceſſity to comply with the intent. It was ſo held in *Bamfield* 1 Wil. 54. v. *Popham*. But to exemplify the caſe of a neceſſary implication, wherever the limitation has been, as to *A.* for life, remainder to his 1ſt, 2d, and 3d, and perhaps 5th ſon in tail, and then, if he dies without iſſue, over; there, becauſe teſtator clearly meant to eſtabliſh a ſtrict line of ſucceſſion in his family, by which he meant, all the iſſue of his blood ſhould take: in order that that may be compleat, and the will take effect, an implication ſhall ariſe to give a remainder in tail ſubſequent to the precedent limitations to the 5th ſon, where he ſtopt ſhort; becauſe the law always prefers the anſwering the intent of teſtator to preſerve the line of ſucceſſion againſt any objection as to the power, which is incident to ſuch eſtate, of ſuffering a recovery; becauſe that is an incident given by law, and is an objection not ſo much to be relied on by the court as the conſtruing it ſo as to preſerve the line of ſucceſſion according to the intent; which was the ground, Eq. Ab. 185. that prevailed in *Shaw* v. *Weigh* to reverſe the judgment of *B. R.*: but otherwiſe the court never conſtrued thoſe words in that manner. As to the perſonal eſtate, it is ſtill clearer; becauſe as to the reſidue thereof it is impoſſible to make good the limitation over without conſtruing it in that manner. Wherever theſe general words *dying without iſſue* are mentioned relative to perſonal eſtate, the bequeſt of which is limited ſo as properly to take place, as it is here, that may not be overturned by implication from ſubſequent words, the court has conſtrued it to mean ſuch iſſue as before deſcribed, to whom the gift is made;

as it was in *Forth* v. *Chapman*; where the court conſtrued *dying without iſſue* in the more vulgar and popular ſenſe, and confined it; for which the teſtator has alſo made the conſtruction himſelf in this caſe. Theſe objections therefore to the plaintiff's claim are not ſufficient. 1 Wil. 663.

But as to the charity, I am of opinion, a diſtinction is to be made. The remainder over of the real to the charity is void; which is given up; and conſequently whenever the death of deviſee for life without children living at the time of her death happens, the reverſion in fee will take place in the plaintiff. But as to the reſidue of the perſonal, I am of opinion, the charity muſt be ſupported; and that it is not contrary to the true intent, meaning, and conſtruction of 9 *G.* 2. As to the point of the mortgage, if that objection was to hold, it would be very fatal. *Attorney General* v. *Meyrick* is very different; there was a ſpecifick legacy of the whole perſonal eſtate, not given by way of reſidue; and the mortgage particularly by name, which the truſtees particularly claimed; and it ſeems (for I do not enter into the point now) agreeable to that caſe of papiſts, who are not capable of taking a mortgage. Here is no part of the perſonal eſtate given ſpecifically; nothing but the reſidue which will remain after payment of the debts, funeral expences, and legacies; which may exhauſt the whole of theſe mortgages, ſuppoſing any ſuch; which does not appear: ſo that it cannot now be ſaid, that there will be one ſhilling of the money ariſing on the mortgage applicable to this charity; *reſidue* implying nothing ſpecifick, only the balance of an account after debts, *&c.* which is not yet known until adminiſtred by the executors, in whom the whole reſidue veſts: or the executors may turn the mortgage into money, and the truſtees can pray nothing againſt them but the balance of an account. The other way of conſtruing this reſidue would be much too large, and make theſe bequeſts ſo uncertain, that the act of parliament might be as well made, that no perſonal eſtate ſhall be given. The queſtion then comes on the conſtruction of the bequeſt in general; to which it is objected for plaintiff, that this reſidue is given in fact to be applied in purchaſe of land, or part of it at leaſt, contrary to the ſtatute; that the court would not have made another conſtruction before the ſtatute, and conſequently ought not now: but I am of opinion, this was not then, nor is now, a neceſſary conſtruction. As to the conſtruction of this clauſe, it comes very near to the caſe of a ſchool; for a ſchool imports, there ſhould be ſome place, in which the children ſhall be taught; for it cannot mean, it ſhould be *ſub dio*. So does an hoſpital import ſome place, in which theſe people ſhould be entertained. There is no direction in this will, that any part of this money ſhould be laid out in building an hoſpital; for *erect* as well imports foundation as building; and therefore was it ſo conſtrued in the caſe of the ſchool; Reſidue of perſonal deviſed in truſt to erect an hoſpital, not within *Mortmain* act.

ſchool; and ſo is *erigimus* conſtrued in charters of the crown and private foundations. It is ſaid, if this caſe had come before the court before the making this ſtatute, the court would have directed part to be laid out in land and building on it, and part in land for endowment and maintenance thereof: perhaps it would be ſo: it is therefore inferred, the court cannot make a different conſtruction to evade the ſtatute: and for that a caſe was cited, where I was not warranted to make an alteration in marſhalling aſſets to evade this ſtatute. I own, I was not. I am of opinion, the court cannot lay down a different rule of law or equity in reſpect of the rights of the parties to take a caſe out of the proviſion of this ſtatute: but that is a very different thing from the manner of executing a charity. The carrying the directions of a will for performance of a charity into execution is different from the other. Now before this ſtatute it would be in the pleaſure of the court to have directed this money to be laid out in land or perſonal ſecurities, the funds: and the court did then frequently direct to lay out money, given to a perpetual charity, in the funds, and not in lands, where the will did not direct to be laid out in land; as this does not. Sir *Joſeph Jekyl* has done it; for he took it to be in diſcretion of the court: and the court has done it ſince in the caſe of money given or collected in a perſon's life to a charity; which there is no reſtraint in this ſtatute from laying out in land: notwithſtanding that the court ſees, this goes ſo near to the miſchief, intended to be remedied by the ſtatute, that the court will not direct it to be laid out in land, but the funds: and, I believe, on that ground, that though by this ſtatute it was lawful to do it, yet, as it was contrary to the tenor of it, I varied a direction given by Sir *William Forteſcue*, late *Maſter of the Rolls*. As therefore this will has not given direction for laying out this in land, before the ſtatute, it would be in the power of the court to direct it either way, and ſince the ſtatute to direct it one way, the funds, the court ought to do ſo; for there is nothing in this ſtatute prohibiting the giving perſonal eſtate to charity, provided it is not to be laid out in land; and the words of the ſtatute are applied to improvident alienations to diſheriſon of their heirs. If a large perſonal eſtate is left to truſtees for a charitable uſe, which they direct, and there is no occaſion to come to a court of equity for direction, there is nothing in this ſtatute reſtraining the truſtees from laying out that in land; becauſe by the expreſs proviſo all purchaſes to take effect in poſſeſſion are good notwithſtanding this act of parliament; which is a matter, may perhaps want a remedy. If indeed theſe truſtees were to come to this court for an eſtabliſhment, I ſhould never direct it to be ſo laid out in land. I have been of that opinion in every cauſe before me; and ſhall continue ſo, while I ſit here: but there is nothing illegal diſabling the truſtees from privately doing it; becauſe the ſtatute makes good all purchaſes, *&c.* But it is ſaid, two purpoſes are to be anſwered:

one

one the erecting, the other the maintenance of the perſons: and that, ſuppoſing the court ſhould take it in the latitude, I now do, as to the endowment and proviſion for the poor, that that may be anſwered by putting it out on the funds; yet the hoſpital cannot be without a building; that land ſhould be bought for that; and the plaintiff ought to have the benefit of ſo much, as the maſter ſhould think the value. I wiſh, I could come at that for this plaintiff; who is as much, or more perhaps, an object of charity, than any of theſe people, who may come into this hoſpital. It is unfortunate: but yet I muſt go according to ſuch rules, as will hold in other caſes. Suppoſe, this happened before the ſtatute; would it have been of neceſſity, any part of this money ſhould be laid out in land to build an hoſpital? If the truſtees had come before the court, and laid a ſcheme, that a certain perſon would give a piece of ground to build this upon, it might be done; the court would have accepted it: or if they had ſaid, there were in *York* ſeveral charitable foundations belonging to the city, and they would let them build thereon for this hoſpital, the court would undoubtedly have accepted it. Nay they might have ſaid, they would take a houſe in *York* for that purpoſe: there is nothing in this ſtatute reſtraining the giving money to build. It is lawful notwithſtanding to give money to build a church. Suppoſe, the univerſities had ſtood under the ſame diſability, as laid on other charities: money might notwithſtanding be given to erect a chapel or hall, or add a building to a college. That is to be executed at once; it locks up no more land: one may give money to add to the buildings of any hoſpital in *London*. Nothing therefore in this ſtatute reſtraining teſtator from doing what he has done with his perſonal eſtate: it is a mere ſurplus of perſonal eſtate given to, what I conſtrue, founding an hoſpital; in the foundation of which the truſtees cannot under direction of this court lay out in purchaſe of land, but may by hiring a houſe in *York*, or by permiſſion in building on a common piece of ground belonging to the city; which is for the benefit of the city. The act of parliament meant to leave perſons to diſpoſe of perſonal eſtate for a perpetual charity: but meant to prevent the great miſchief of giving land for that, or money to be laid out in land; as that would lock up land from being uſed in a commercial way; which would be a detriment to the publick. The clauſe of the purchaſes in the ſtatute, I very well know, was put in relative to Q. *Ann*'s bounty; and, whether that may want a remedy hereafter, may be a queſtion.

The bill muſt be diſmiſſed: but without coſts.

N. His Lordſhip obſerved, that the legal eſtate is made void by the act of parliament, which operates like the popery acts.

Case 60. Peacock *verſus* Monk, *Feb.* 27, 1750-1.

Baron and Feme.

MRS. *Leſtock* having purchaſed a real freehold eſtate in a houſe in the life of her huſband, Admiral *Leſtock*, and deviſed it in his life, the queſtion was, whether it could paſs thereby, ſhe being a *feme covert* at making her will and her death?

Another queſtion was, as to an account prayed of what ſhe received out of her huſband's eſtate?

LORD CHANCELLOR.

As to the account prayed, there is no difference between the caſe of a wife, who has a ſeparate eſtate of her own by agreement before marriage, and a wife who has not, as to an account ſought of money come to the hands of the wife during coverture: that is in general; for I do not ſay, but a caſe may be made for that: and it would be difficult, eſpecially in the caſe of a ſeafaring man who left every thing to his wife's management, if there ſhould be ſuch a difference: for it is common, that by agreement between huſband and wife ſhe has ſome ſeparate eſtate left for her diſpoſal, as pin-money, which ſhe may not only uſe, but by the contract may diſpoſe of what ariſes out of her pin-money, as a feme ſole: then if after the death of huſband and wife her repreſentatives may be called to account for whatever ſhe received during coverture, it might be impoſſible to have ſuch account taken. If indeed a ſpecial caſe had been made, that ſuch a wife had clandeſtinely poſſeſſed herſelf of groſs ſums belonging to the huſband, which ſhe endeavoured to cover by her having her ſeparate eſtate, it might be otherwiſe: but no ſuch caſe has been laid before me, nor any particulars of the management between the huſband and wife except as to ſome receipts for money on notes, which was certainly received out of money belonging to the huſband; and there is a letter importing that theſe were loans made to her to be applied for benefit of her huſband; and that afterward, when ſhe received her huſband's pay, ſhe diſcharged theſe; and the tranſaction imports, that ſhe had a letter of attorney from her huſband to act in that manner. Then it is impoſſible to take ſuch an account, or diſtinguiſh, how much of this money ſhe applied to her huſband's uſe, for the maintenance of him and his ſervants, and how much to her own uſe, and that after the death of the parties. The court has laid down rules to prevent ſuch accounts between huſband and wife; which it is impoſſible to determine according to the rights after death of the parties; as in the caſe of pin-money, which they never carry back beyond the year.

After death of huſband and wife, her repreſentatives not to account for money received during coverture, whether ſhe had ſeparate eſtate or not; unleſs a ſpecial caſe made.

Account of pin-money never carried back beyond the year.

As

As to the other queſtion of the houſe: agreements for ſettling eſtates to the ſeparate uſe of the wife on marriage are very frequent, relating both to real and perſonal eſtate. As to perſonal, undoubtedly, where there is an agreement between huſband and wife before marriage, that the wife ſhall have to her ſeparate uſe either the whole or particular parts, ſhe may diſpoſe of it by act in her life or will; ſhe may do it by either, though nothing is ſaid of the manner of diſpoſing of it: but there is a much ſtronger ground in that caſe, than can be in the caſe of real eſtate, becauſe that is to take effect during life of the huſband; for if the huſband ſurvives, he is intitled to the whole, and none can come into a ſhare with the huſband on the ſtatute of diſtribution. Then ſuch an agreement binds and bars the huſband, and conſequently bars every body. But it is very different as to real eſtate; for her real eſtate will deſcend to her heir at law, and that more or leſs beneficially; for the huſband may be tenant by curteſy, if they have iſſue; otherwiſe not: but ſtill it deſcends to her heir at law. Undoubtedly on her marriage a woman may take ſuch a method, that ſhe may diſpoſe of that real eſtate from going to her heir at law; that is, ſhe may do it without fine: but I doubt, whether it can be done but either by way of truſt or of power over an uſe. In the firſt inſtance, ſuppoſe a woman having a real eſtate before marriage, and either before or after marriage by a proper conveyance (if after marriage it muſt be by fine) conveys that to truſtees in truſt for herſelf during her coverture for her ſeparate uſe; and afterward that it ſhould be in truſt for ſuch perſon, as ſhe ſhall by any writing under her hand and ſeal, or in nature of a will, appoint; and in default of appointment to her heirs: ſhe marries, and makes ſuch appointment as that deſcribed: that is a good declaration of the truſt; and this court would ſupport that truſt; and it could never be a conveyance to the heir at law againſt this direction to the truſtees. So may it be done by her by way of power over an uſe; as if ſhe conveyed the eſtate to uſe of herſelf for life, remainder to uſe of ſuch perſons as ſhe by any writing, *&c.* ſhould appoint, and in default of appointment to her own right heirs: this is a power reſerved to her; and it has been determined in this court, that a *feme covert* can execute a power; as in *Travel* v. *Travel*, and *Rich* v. *Beaumont*,† where the *Lords* ſent a caſe to *B. R.* for their opinion (which they never did before), but can a *feme covert* do this ſo as to bar her heir by a bare agreement without doing any thing to alter the nature of the eſtate? Can a woman having a real eſtate before marriage, in conſideration of that marriage enter into an agreement with her huſband, that ſhe may by writing under her hand executed in preſence of witneſſes, or by will, diſpoſe of her real eſtate? This reſts in agreement; and if ſhe does it, though it may bind her huſband from being tenant by curteſy, that ariſes from his own agreement: but what is that to the heir at law? Still ſhe is a *feme* under the diſability of coverture at the

Wife may diſpoſe of her ſeparate perſonal eſtate by act in her life or will: but her real deſcends to her heir, unleſs properly conveyed; as by fine if after marriage; if before, by way of truſt, or power over uſe; but not by bare agreement; which can only bar tenancy by courteſy; unleſs perhaps it is ſuch, as would be decreed to be carried into execution.

Feme covert may execute a power.

† 1. C. 3. Bro. Parl. Cas. 400.

the time of the act done; and if she attempts to make a will, the instrument is invalid. The only question, that could arise, would be, whether such an agreement between her and her husband would not give her a right to come into a court of equity after the marriage to compel that husband to carry this into execution, and to join with her in a fine to settle the estate either on such trusts, or to such and such uses? And if it is such an agreement, as the court would decree to be farther carried into execution by a proper conveyance, then the question may be, whether her heir at law is not to be bound by the consequences of that agreement? But that is the only way, by which it could be brought in. But if the agreement cannot be carried into execution, though she might have power to bar her husband, it being a voluntary claim from her, and the law casting the descent on her heir at law, I very much doubt, how it could it done. But this is clear of both these objections; for this is not real estate, the wife had at time of the marriage; the agreement between the husband and wife is only as to such; and consequently here is not an agreement by the husband to give the wife a power to make such a disposition of real estate, she should purchase or acquire after the marriage; and therefore her will could not extend to it: for though in respect of the husband, money to be laid out in land will be considered as part of her separate estate, yet it is going a great way to say, that it shall be considered as personal as between her heir and executor; for she having made it realty, this court would say, it was in that manner; and she has purchased it so as to go to her heir; for she takes the conveyance directly of the legal estate to the use of herself and her heirs, not to trustees, and this by a subsequent act: then the legal estate vests to the use of herself and her heirs. How can a will made during her coverture prevent the descending to her heir at law? It is impossible; this being confined to such real estate as she had at time of the marriage. Consequently this house must be taken to descend to the heir at law of Mrs. *Lestock*.

M.r York's Mss. agrees with y.e report, that Ld Hardw. inclined to think, that such an agreem.t wo.d not bind the h.r

At the bar was cited a case before the counsel, where a real estate of a wife was by settlement before marriage secured to her separate use, and as if she was a *feme sole*: but no power given her to devise it: and it was insisted, that as to the trust of this estate she was to be considered as if a *feme sole* in this court; and compared to personal estate the separate property of the wife, to which property it is incident, that she may make a will or appointment of it. It was said, that as to land there was a difference; for that the husband could not give her power to make a will of lands; and that the heir at law was concerned, in not being disinherited but in such a way, as that she should be secretely examined: and in that way did *Willes* C. J. (who said, he had

had conſulted the other judges abour it) determine, that the will was void, and the eſtate was claimed by Ld. *Leiceſter* as heir at law. It turned ſingly on this; that a woman, who had a real eſtate to her ſeparate uſe, ſhould not be in equity conſidered as the abſolute owner of it; and that there was no precedent of it, though ſeveral as to perſonal: that this determination at the council had the ſubject of a good deal of diſcourſe; it ſeeming extraordinary that ſhe ſhould not have this in equity as incident to her ownerſhip.

Evidence. Letters or books of agent or ſervant, if dead, allowed.

On objection to evidence in this cauſe, *Lord Chancellor* ſaid, that though letters or books of an agent or ſervant may be read, if he is dead, they cannot otherwiſe; according to *The Dutcheſs of Marlborough* v. *Guidot*; where the *Lords* held, that the letters of *Wigmore*, though agent of *Guidot*, could not be read, becauſe he was living, and might have been examined.

Wife having ſeparate eſtate, borrows money, her declarations allowed.

And further, if a wife having an eſtate to her ſeparate uſe borrows money, which ſhe gives a bond to pay under hand, this would give a foundation to demand the money againſt her out of her ſeparate eſtate, ſhe being conſidered as a *feme ſole* as to that; and the declarations of her, the debtor, may be read in evidence.

February 28, 1750-1. Caſe 61.

Injunction to re-erect a nuſance: denied.

MOTION in the caſe of Sir *Liſter Holt* for liberty to re-erect a nuſance, and then to be quieted in the enjoyment of it until the hearing of the cauſe.

Lord Chancellor ſaid, he had known ſeveral of theſe motions made, but hardly ever knew it granted by giving expreſs liberty to re-erect a thing pulled down. Suppoſe, a houſe was built on, what was inſiſted upon to be, the highway; and that was pulled down: the court moſt certainly would not give liberty to re-erect that building. He therefore would not grant the injunction; but the utmoſt, he could do, was to put it in a ſpeedy method of trial.

The general rule is, you muſt eſtabliſh your right at law, before you bring a bill of peace.

Orr *verſus* Kaines, *March* 1750-1. Caſe 62.

At the Rolls.

BILL for ſatisfaction of a legacy out of aſſets againſt repreſentatives of executor; who, though living ſeveral years after

death of teſtatrix, never exhibited an inventory, and had paid the whole of all the other legacies. Defendants admitted aſſets of the executor; and it came on upon the Maſter's report.

Executor not exhibiting inventory, and having without difficulty paid all legacies but one; evidence of aſſets for that.

Sir *John Strange* held theſe circumſtances a foundation to ſay, he had given evidence of a receipt of aſſets againſt himſelf ſufficient to anſwer this legacy as well as the reſt, and the intereſt. Not exhibiting an inventory, which every executor ought, eſpecially in a deficient eſtate, is an imputation upon him, whereas no lacheſs can in this caſe be imputed to plaintiff in not calling on him. This, though not concluſive evidence, always inclines the court to bear harder on an executor, becauſe he may at any time relieve himſelf by an inventory, if he finds the eſtate deficient. He is admitted both at law on plea of *plene adminiſtravit* and on account of aſſets here to ſhew, that the money, for which by ſolemn inventory on oath he has charged himſelf, has by accident, as perhaps failure of ſome great merchant in the city, not come to his hands: ſo that its not being finally binding is one reaſon, why he ought to exhibit an inventory. Next, every executor ought after debts and funeral-expences to ſee, what remains for legatees; and, if not enough for all, ſhould appriſe them, and pay all in proportion: whereas his paying the reſt without difficulty within the year is the ſtrongeſt evidence againſt him. The rule, of which there are ſeveral caſes in *Eq. Abr.* is, that whenever an executor pays a legacy, the preſumption is, he has ſufficient to pay all legacies; and the court will oblige him, if ſolvent, to pay the reſt, and not permit him to bring a bill to compel the legatee, whom he voluntary paid, to refund: although if the executor proves inſolvent, ſo that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund. But this is the caſe of a ſolvent executor, whoſe repreſentatives admit aſſets: it is impoſſible therefore for plaintiff to have ſatisfaction againſt any one but the executor, who has acted ſo, as that the court will preſume him to have received aſſets ſufficient for this demand.

Inventory not concluſive to executor on variation of circumſtances.

Legatee, paid voluntarily by executor, not obliged to refund to the reſt, unleſs executor becomes inſolvent.

2. P. Wms. 447. 1. P. Wms. 495. Vid. Fin. Abr. 423. pl. 35. Mitf. Plead. K. cas. n°. 716. 1163. 1. Vern. 93. 94. 1. Cha. Cas. 136. 2. Cha. Cas. 132.

Caſe 63. Targus *verſus* Puget, *March* 1, 1750-1.

At the Rolls.

Truſt-money in marriage articles in power of the court, and conſtrued againſt the words for ſake of the intent, by ſupplying the words if wife ſhould die without iſſue.

UPON a treaty of marriage the parties agreed, that, as the intended wife was intitled to 1250*l.* the huſband, who by a former wife had iſſue living, ſhould out of his ſubſtance advance 1250*l.* to add and ſettle both together; therefore the wife's mother as executrix of her huſband, who had left his eſtate in diſtinct proportions between this and another daughter, advances to the truſtees 1250*l.* the huſband does the ſame; and both are laid out in government ſecurities

curities in name of the truſtees. The firſt declaration of the truſt, that from and after the marriage the truſtees to permit huſband to receive all the dividends and profits ariſing from this ſum during the joint lives of himſelf and wife: if the huſband ſhould die firſt without leaving any child of the marriage, the wife to have the 2500 *l.* transferred to her within a month after his deceaſe: but if the huſband ſhould die firſt leaving iſſue of the marriage, inſtead of the truſtees transferring the 2500*l.* to her, ſhe ſhould have it only for life for her own ſupport, and maintenance of her children: but if the children afterward died in life of the mother, her right of having the whole in the firſt inſtance on death of her huſband without iſſue ſhould revive: *if on the contrary ſhe ſhould die before the huſband, ſhe ſhall be at liberty to diſpoſe of by will or other writing under hand and ſeal* 500 l. *to be levied out of the capital for ſuch perſon, as ſhe ſhould think fit, and in default of appointment to her mother, if her mother ſurvived her; if her mother did not ſurvive, to her ſiſter*; and all the ſurplus of the capital ſhould belong to the huſband to diſpoſe of it at his will and pleaſure. The wife had a proſpect of ſomething coming from *France*; and by a diſtinct article, independent of the reſt, whatever came to her that way, ſhe ſhould have the abſolute diſpoſal of it for the children.

The wife died in life of the huſband leaving a ſon and daughter: one of the defendants, the wife's ſiſter, claimed the 500 *l.*

For Plaintiff. This is a caſe of truſt-money and of the conſtruction of articles executory; ſo that the court has a latitude to conſtrue according to the real intent; which was to provide for the wife and iſſue of the marriage, and to put it out of power of the parties to defeat the iſſue; and abſurdity will follow, ſhould they not be provided for in either event of the huſband or wife dying firſt. *Spalding* v. *Spalding*, *Cr. C.* 185. *Kentiſh* v. *Newman*, 1 *Wil.* 234. and in *Coriton* v. *Hellier*, 10 *Aug.* 1745 on deviſe of a term for ninety-nine years, *L. C.* ſupplied the words, *if he ſo long live*; for that, being the caſe of a truſt, a court of equity had more power to mold it according to the intent, if it could be picked out by any part of the inſtrument.

For defendant. The words of the deed ought to be abided by, and defendant intitled to this money. In *Harwood* v. *Wallis* by Sir *William Forteſcue*, late Maſter of the *Rolls*, previous to marriage the premiſes were agreed to be ſettled on intended huſband for life, remainder to wife for life, remainder to firſt, *&c*: ſon in tail male; remainder to all and every daughters of that marriage. Inſtructions were given to an attorney to draw the ſettlement, who drew it as far as the limitation to the ſons in tail male, where he ſtopped, and ſaid, then go on as in *Pippin* v. *Ekins*; which was a precedent, he

delivered to his clerk to go on from that limitation, and was a right ſettlement on the iſſue male and daughters by that wife: but the clerk drew the ſettlement to all the daughters of the huſband without reſtraining it to that marriage: it was executed with this miſtake: the plaintiff the only daughter of that marriage: the huſband by a ſecond wife left a ſon and four daughters, the defendants. It was inſiſted, that the letting in the daughters of the ſecond marriage would make the firſt wife a purchaſer for them or other ſucceſſive wives to deſtruction of the intereſt of her only child: the draught of the attorney was proved, and the ſettlement in *Pippin* v. *Ekins*: but the court would not admit parol evidence of the attorney to be read, and held, that the other evidence would not do; that nothing appearing in writing under hands of the parties, the ſettlement could not be altered: though there was as much more manifeſt miſtake than in the preſent. The court cannot give a right, though they may find it by conſtruction: here is nothing farther to be done, they cannot be called or conſidered as articles. The truſt itſelf is indeed to be executed: but executory only means temporary articles made before marriage: nor are there any minutes or draught here to amend by. This is therefore only matter of conſtruction of this deed: and not like *Kentiſh* v. *Newman*; the report of which is grounded on circumſtances. The court never puts a different conſtruction, but where there is ſomething expreſs for that on the doubtful words, or where there muſt be a direct and abſolute contradiction on the face of the articles, or ſome ſtrong implication from the expreſſion of the deed without which it would be uncertain: but never inſerts words merely from a gueſs at the intent.

Sir *John Strange*.

We muſt examine, firſt whether the court can be ſatisfied what was the intent? Next whether it is in the power of the court to direct an execution of this truſt ſo as to ſquare with and anſwer that; both which muſt be determined in favour of the plaintiff to intitle to relief prayed? If the latter part of the proviſion is to be taken literally according to the expreſs words, it is to go away from the children of the marriage, all of it. This is ſo unlikely to have been the intent, that it is natural to imagine, even to real conviction, that there is a miſtake in the wording, and that the intent was plain to provide for the iſſue of the marriage in either event. The words, *if on the contrary the wife dies firſt*, point out plainly a dying without iſſue; ſuch a dying as is ſpoke of before: otherwiſe the antitheſis does not hold. The court ſhould in point of conſtruction ſupply thoſe words repeated in the former clauſe. The mother advances nothing of her own: the huſband advances penny for penny: it is unnatural then to imagine, it was his intent, or that of the parties, that near half her fortune, 500 *l.* ſhould be in her power to give away from her own children, and that even without any act by her

at all; which makes the abſurdity greater; for it is not giving her a power to diſpoſe of it or not, to keep them obedient, but to the ſurvivor of her mother or ſiſter. It is not likely then, that the huſband ſhould agree to that; though perhaps if he had nothing, or the wife a ſuperior fortune, it might be otherwiſe. But it is more unlikely that the truſtees of the intended wife ſhould agree to this, that every penny, of what was brought in by her, ſhould be diverted from the iſſue of the marriage: yet that is the conſequence of the latter clauſe; which is therefore explained by the former words; and muſt be ſuch a *contrary* as anſwers the other. Nor is there any thing in the articles contradicting this: and the diſtinct clauſe as to her expectation from *France* is a plain demonſtration, that the benefit of the children was in the parties view throughout; for it is not to be conceived, he would ſtrip the children of this whole ſum, and provide for them by this remote proſpect. As the huſband had iſſue by a former wife, it makes the caſe ſtronger; as he might then give it to them, though there might be many children by the ſecond marriage. Next whether this is a caſe, in which the court is warranted to ſay, the truſtees ſhall transfer this money according to ſuch intent, or not? I am ſatisfied, it is in power of the court to direct an execution of this truſt; and I call theſe executory articles, becauſe of the abſolute neceſſity to come into this court to have them executed. So if I was of opinion, this 500 *l.* belonged to the mother or ſiſter: the truſtees would hardly venture to transfer without it. So if the father was living, he muſt come into this court. This is a caſe then of truſt-money under power of the court to direct; and in *Kentiſh* v. *Newman* it is particularly taken notice of, that being truſt-money the court had power over it. That caſe ſeems entirely in point; exactly the ſame proviſion; and the reaſoning of the court there ſtrongly applicable. The perſons, in whoſe hands it was, are not to have the money to themſelves; they are truſtees for one or the other. The wife in fact never conſidered herſelf intitled to the diſpoſal of this from her own children: it may be ſaid, ſhe knew, where it would go if no appointment by her; but that is rather an argument to the contrary. It is not very material, in what light the husband ſaw this: yet is it plain, he did not conſider it as giving him any power over this; for by his will he takes notice of it as a thing which would of right come to theſe children, otherwiſe he would have given it expreſly to them; which ſtrongly ſhews, what was the intent of the parties: though little weight is to be laid, except on what ariſes on the face of the articles themſelves. Thoſe circumſtances, on which *Kentiſh* v. *Newman* was ſaid to be grounded, are only thrown in at the end of the report by way of addition: the ground there was the intent collected from the inſtrument; and the impoſſibility of a deſign to carry away from the iſſue of the marriage in favour of a remote relation; and that is the preſent caſe. The ſiſter has an equal fortune with the wife: if there had been no

children, it might be reaſonable to let it be in her power to do ſomething for her mother and ſiſter: but never to carry it ſo far as to ſay, it was the intent, the whole ſhould go away from the iſſue in that ſingle event, that has happened. The defendant therefore is not intitled under theſe articles to 500 *l.* but the whole ſum now remaining in the ſtock is diviſible in moieties between the ſon and daughter.

Caſe 64.

Lord Teynham *verſus* Webb, *Mar.* 2, 1750-1.

Grandmother under a power creates by deed a term to commence after her death to raiſe money for younger children with power to father to appoint: if no children, to her own executors. A younger ſon become eldeſt excluded.

LADY STRANGFORD, having a power over an eſtate, created a term of five hundred years to commence after her own death for raiſing 300 *l. per ann.* for her daughter *Elizabeth Audley* during life; and from and immediately after the death of herſelf and *Elizabeth Audley*, and the ſurvivor of them, to raiſe 6000 *l.* to pay 5500 *l.* part thereof to and among all and every child and children, ſons and daughters, of Lord *Teynham* by his then wife begotten or to be begotten, except their eldeſt ſon, in ſuch parts, ſhares, and proportions, as the ſaid Lord *Teynham* by any writing under hand and ſeal, atteſted by three credible witneſſes, ſhall direct and appoint; for want of appointment then in equal proportions ſhare and ſhare alike. If it ſhould happen, that Lord *Teynham* by his wife ſhould have but one child beſides the eldeſt ſon, the ſaid ſum of money to be paid to ſuch child; if none except the eldeſt ſon, then to be paid to that eldeſt ſon; if no eldeſt ſon, then to go to executors and adminiſtrators of Lady *Strangford*.

ſee 2. Vern. 528. 660. 1. Ves. 209. 290. 111. 1. Bro. Cha. Cas. 77. Forrest. 93.

At the time of making this deed in 1710. Lord *Teynham* had but one ſon *Philip* and a daughter *Mary*: but afterward had another ſon, the preſent plaintiff. Lord *Teynham* died in 1723. without having executed his power; *Philip* died in 1727. not quite of age; on which his younger brother the plaintiff, then about eighteen, ſucceeded to the honour and eſtate of the family. In 1729 *Mary* married Mr. *Webb* with the privity and approbation of Lady *Strangford* and the reſt of the family. Lady *Strangford* died in 1730; *Elizabeth Audley* in 1732.

Mr. *Webb* having given a note to pay his father 3500 *l.* out of this ſum, which was to be raiſed for his wife's portion, his wife after her husband's death purchaſed this note for 1500 *l.* to which the plaintiff was proved to be privy, and to have encouraged his ſiſter thereto, and to have aſſiſted her in raiſing the 1500 *l.*

The plaintiff uſed to receive the intereſt of this 5500 *l.* and pay it to his ſiſter and her husband: but now brought this bill to have a moiety of this 5500 *l.* raiſed and paid to him with the intereſt thereof; or that, if the defendant his ſiſter had received the whole intereſt

reſt of the whole ſum, ſhe might account to him for one moiety of that intereſt in conſequence of his right.

For plaintiff. The firſt queſtion is, at what time this portion, provided for the younger children, veſted an intereſt in them? Three times may be conſidered; the death of the father, or of *Elizabeth Audley*, or the time of the term coming into poſſeſſion. There is a difficulty in conſidering it veſted at either of the latter times; therefore it ſhall be at death of the father, when plaintiff was clearly one of the objects, for whom this proviſion was made; and would be ſo intitled, if things had remained in that ſituation, although the term did not come into poſſeſſion by way of raiſing the profits of it till after thoſe two periods of time. The ſuſpenſion of veſting was only, while the father's power of appointment continued, which ended with his death, being no longer executory or uncertain: and in this light this caſe is like thoſe determined on the doctrine of reverſionary terms; for, which ever way determined, the court has inclined ſtrongly to the veſting the intereſt independent of the commencement of the term, 1 *Wil.* 448. 2 *Ver.* 460. Suppoſe the father had appointed it to be equally divided, it would have veſted, and could not be deveſted; then it veſts equally in default of appointment. There is no implication of the not intending from the plaintiff's having the inheritance as in the caſes on marriage articles; for the plaintiff has not the inheritance of this eſtate. There is nothing in this deed, or in what happened afterward from becoming an elder ſon, that will diveſt it: nor any caſe where the court has ſaid, a veſted intereſt in a younger child ſhall be taken from him on his becoming an eldeſt. There is nothing contingent in the payment itſelf, but from the circumſtances of the fund: the payment being only ſuſpended for benefit of *Elizabeth Audley*. Then it is the common caſe of a ſum to younger children, but payable at a future time; the ſuſpenſion of which payment is merely on collateral conſideration of the perſons, who were to receive the benefit of it during their lives. In *Lowther* v. *Condon* * the time of payment was only ſuſpended from circumſtances of the fund: yet your *Lordſhip* held it veſted. A contingent, much more a veſted, intereſt is tranſmiſſible. The court never takes away the benefit of a younger child's veſted portion for the other children on the particular hardſhip or circumſtances of the caſe; *Graham* v. Lord *Londonderry*, 24 *Nov.* 1746; where the truſt of two terms was declared, if the father ſhould have one iſſue male and other child or children, ſon or ſons, daughter or daughters, to raiſe the following portions; if but one younger child, 5000 *l.* if two or more, 10,000 *l.* to be equally divided among them; to be paid to the ſons at twenty-one, to the daughters at eighteen or marriage, which ſhould firſt happen after death of the father, or otherwiſe at ſuch times during his life as the father ſhould think fit, if he thought proper to appoint it; if any younger child died before his portion became

* Cited Ante in Hodgſon v. Rawſon, Nov. 6, 1747.

came payable, it ſhould go to the ſurvivors, ſhare and ſhare alike, ſo as the portion of an only younger child ſhould not exceed 5000 *l.* if none lived to be intitled, it ſhould not be raiſed. At the father's death there were two ſons and a daughter: Lord *Londonderry* was then a younger child, but before he was twenty-one, he became eldeſt by death of his brother: yet your *Lordſhip* held, he was intitled to his portion as a younger child, it being to be taken as at death of his father: it was admitted not ſo veſted in him at his father's death as to have it raiſed, and that if he died before raiſed, it would not be tranſmiſſible: but as he lived to twenty-one, though he became eldeſt before, it was originally ſo veſted, that he was intitled to his ſhare. In *Trafford* v. *Aſhton*, 2 *Ver.* 660, though an eldeſt ſon was expreſsly excluded, another becoming eldeſt was intitled. *Chadwick* v. *Doleman*, 2 *Ver.* 528. is very different: that was an appointment by a father over his own eſtate: and ſuch powers are conſidered in a larger ſenſe than powers over another eſtate: nor will that caſe be extended farther. Deveſting is odious in law, and unleſs through neceſſity not admitted. Several inconveniences ariſe from poſtponing the veſting till a time after the father's death; for that will hold throughout among all the younger children; as if all, eldeſt and youngeſt, ſhould die in life of Lady *Strangford*, it would go to her repreſentatives; or if plaintiff's brother had lived a great while, and died but a little before *Elizabeth Audley*, plaintiff might have continued ſeveral years, his whole life perhaps, a younger child without any proviſion under this deed: nay even the defendant would have been in the ſame caſe; for there no other proviſion for younger children under the family-ſettlement: theſe difficulties prove, the intent was otherwiſe. As to the ſubſequent acts of plaintiff, ſuppoſing the evidence goes to the payment of the whole intereſt to defendant, no proof that plaintiff ever knew of any ſuch proviſion made for him, or that he had any right to it, or that knowing his right he intended it as a gift to his ſiſter; ſo that if a miſtake, it cannot give away a right. The court often relieves a miſtake: but will never from ignorance of a right transfer it to another.

For defendant. All arguments of favour are with the defendant; the intent being that the owner of the eſtate ſhould not come into a ſhare of this portion; which would have been ſtronger, if there had been more younger children: beſide defendant's husband, in whoſe place ſhe ſtands, has purchaſed this portion on the aſſurance of the whole family, and of Lady *Strangford* the giver. The plaintiff has acquieſced twenty years; and his repreſentative might as well bring this bill a hundred years hence. The plaintiff became an eldeſt ſon, intitled under his father's ſettlement to the whole family-eſtate, before he was of an age or in circumſtances to require a younger child's portion, *viz.* before twenty-one, the time of payment of ſuch portions. The queſtion is, whether plaintiff by this after thought is

intitled

intitled now to this money, and conſequently to have all this intereſt refunded?

There are three lights to conſider this in; in none of which can plaintiff be intitled. Firſt as a gift out of a perſonal fund; becauſe it is a ſum of 6000*l.* to which Lady *Strangford* was intitled, and for want of appointment by her to go to her executors and adminiſtrators. Secondly as a gift out of land; for it is ſo in it's nature, being a truſt of a term. Thirdly as being a proviſion in nature of a portion, which is very ſingular; for there are determinations on portions, which will hold to no other.

As to the firſt, The diſtinction is well known, taken originally by the civil law, and adopted by the eccleſiaſtical courts in this kingdom, that where the time is annexed to the ſubſtance of the gift, if the party dies before that time, or that event never happens, he never can claim that gift: but where the time of payment is annexed only as a circumſtance, as if payable at twenty-one, it is otherwiſe, veſting immediately and being tranſmiſſible. Here are no words of gift independent of the direction to pay; the whole gift ariſing from thence; ſo that it is inſeparable from the nature and ſubſtance of it. It is a future time of payment depending on events; *Lady Strangford* could not tell, who would be younger children at that time; and therefore the perſons are not named; but then they muſt come within that deſcription: and whoever is then eldeſt, is excluded. So that the plaintiff cannot claim, if this was by way of legacy; and the execution of powers are conſidered as wills. In *Atkins* v. *Hiccocks* where it was a ſum of money to be paid on marriage, and there were veſting words before the marriage, it was contended, it would veſt: yet on conſultation with *Civilians* your *Lordſhip* held, that wherever money is given eventually in the conſideration of giving it, if the party died before that event, he could never have it.

But conſidering it in the ſecond light, as it really is, the certain rule of this court is, that wherever a ſum is generally payable out of land at a future day or future event, unleſs the perſon lives to that day, or that event happens, it never can be raiſed, but ſhall ſink into the eſtate for benefit of the inheritance, the veſting being applied to the contingency. The court alone can make a decree for raiſing it, the Eccleſiaſtical court having no concurrent juriſdiction; and the rule of the civil law not taking place; this court therefore is at liberty to determine as it would in caſe of a legacy if no concurrent juriſdiction of the eccleſiaſtical court, which this was obliged to adopt: otherwiſe the party

might chuſe his court to ſue in, and vary the right accordingly. Where money is payable out of land, this court goes by the common law; conſidering it by way of condition or covenant to pay the money, and determines, that it ſhall never be raiſed out of land; as if it was a covenant to pay to another at his age of twenty-one, no action of covenant can be maintained, if the party dies before twenty-one, the money by the common law not being due. There is no exception to this rule; for the diſtinction introduced in *King* v. *Withers*, and allowed by your *Lordſhip* ſince, is, where there are two times of payment, one applicable to the nature of the gift and circumſtances of the perſon, object of the bounty, the other drawn from the nature of the fund and for the ſake of the convenience thereof, if the time of payment adapted to the nature of the perſon is come, though the other is not, it ſhall veſt. It has been attempted to have that introduced as an univerſal rule in all caſes: but as often denied. It is material to ſee Lord *Talbot*'s opinion upon it, who took the diſtinction. In *Bradly* v. *Powel* he held, it could not be raiſed, becauſe the party died before the day; and among other reaſons that it differed from *King* v. *Withers* and *Broom* v. *Barkley*, becauſe the only contingency was the death of the father. Again he held the ſame in *Bright* v. *Norton*, 13th *July* 1736, and of the ſame opinion has your *Lordſhip* always been. As in *Hall* v. *Terry*, *Michaelmas* 1738; which was a deviſe to *A.* after the death of his wife, ſo as he, his heirs or aſſigns, ſhould, within twelve months after the eſtate ſhould come to him, pay to *O.* 200*l.*: *O.* died within the twelve months after death of the wife: your *Lordſhip* held, it could not be raiſed, becauſe but one contingency. And in *Lowther* v. *Condon*, which came twice before your *Lordſhip*, you adhered to the ſame opinion: there were two times of payment, twenty-one or marriage: he married: and it was urged on this diſtinction: your *Lordſhip* decreed for the plaintiff there: but ſaid, that where there was but one time of payment, before which the party died, the caſes had been, that it ſhould not be raiſed. This ſhews, it is too much in taking it for granted, that, if the plaintiff had died a younger child before the time of payment, it would have gone to his repreſentative. Here is but one contingency ſingly after the death of two perſons; the deſcription, and conſequently the capacity, never happens; and nothing to hinder the court from judging according to the common law.

Tal. 117.

Tal. 193.

Cited ante. *Hodgſon* v. *Rawſon.*

But to conſider it in the third view, here is a grand-mother, who knew the ſettlement made on her daughter's marriage with the late Lord *Teynham*, and that it was a ſettlement of the whole eſtate on the eldeſt ſon for the time being, without any proviſion for the younger children, although ſhe brought a fortune of

12000*l.* which unaccountable defect ſhe had a mind to remedy in ſome degree, but could not do it compleatly; for if it had been a proviſion in a marriage-ſettlement for portions, maintenance would be directed for the younger children after death of the father; ſo that ſhe did it in ſome degree, but ſtill leaving it in ſome meaſure to Lord *Teynham*. Then although it is not by a father or mother, it is by a parent, and under particular circumſtances, and in nature of a portion to a younger child as younger in excluſion of the elder ſon as elder. Then a greater latitude is exerciſed by the court in determination of portions, and all the conſequences of them, than is to be applied to any other caſes. on this ground the court implies a conſtruction from the nature of the gift, as Lord *Talbot* ſays in *King* v. *Withers*, different from and contrary to the words; nay that, which is not expreſſed in the words. There is no arguing from the caſe of portions to any other whatever. A younger child does not in propriety of ſpeech include the firſt branch: and yet the eldeſt daughter is always a younger child, where there is a queſtion of portions, from the nature of the gift, not from the conſtruction of language. 1 *Wil.* 244, 448. Firſt born, and eldeſt ſon, are ſynonimous: yet no doubt but a tenth ſon may become the eldeſt as between him and his ſiſters. The court frequently puts a reaſonable meaning on words; ſometimes poſtponing, ſometimes inſerting, words; but this caſe does not want either. Eldeſt and youngeſt are often in deeds and wills underſtood in a ſenſe, they cannot ſtrictly bear, to anſwer the general intent. In *Duke* v. *Doidge*, *(a)* 22d *April* 1746, a collateral relation meant to

(a) Duke v. *Doidge* (from Mr. *Noel*) was to this effect. *Richard Doidge* by deed in 1706, limited lands (which were ſettled on him and his eldeſt ſon *Richard* and their heirs) after their deaths without iſſue male to the uſe of their executors for 1500 years in truſt, that if *Thomas Doidge* ſhould at commencement of ſaid term have more ſons than one, or one only and one or more daughters, out of the rents and profits or by mortgage or ſale to raiſe for the portions of all and every ſon or ſons, and daughter or daughters of *Thomas*, ſuch ſum, not exceeding 1500*l.* as the ſurvivor of ſaid *Richard* the elder and younger ſhould by writing, *&c.* or by will appoint; and in default thereof to raiſe 1500*l.* for the portion and portions of ſuch ſons and daughters equally to be divided, payable at the end of ſix months after commencement of ſaid term: but if no ſuch *younger* children be living at commencement of the term, or if the perſon next in remainder intitled to the inheritance ſhould pay ſuch portions, or the ſame ſhould be raiſed, the ſaid term ſhould be ſurrendered; and from and after determination of ſaid term to the uſe of ſuch ſon of *Thomas* as *Richard* the elder and younger, or ſurvivor of them, ſhould by deed or will appoint, in tail male; and for want of ſuch iſſue or appointment to the uſe of the firſt and every other ſon of *Thomas* ſucceſſively in tail male; and for want of ſuch iſſue to right heirs of *Richard* the elder. *Richard* the elder and *Thomas* died in life of *Richard* the younger; who by deed in 1716 appointed the premiſes after determination of ſaid term to uſe of *Richard*, third ſon of *Thomas* and heirs male of his body, directing that he ſhould be the ſon of *Thomas*, who ſhould firſt take, with power to revoke ſaid appointment; and in 1732 dies without iſſue, and without revoking, or making appointment of any ſum for younger children of *Thomas*. The iſſue of *Thomas* living at commencement of ſaid term were three ſons and one daughter, *George*, *Robert*, the ſaid *Richard*, and *Anne*. The bill was by *George* the eldeſt; and the queſtion, whether he was intitled to a ſhare of this 1500*l.* as a younger child?

1 *L. C.* 5 *Jodr. Mſs.* 186.

Elder ſon unprovided for by collateral relations conſidered as a younger.

Per

to make a proviſion for younger children, thoſe who wanted that proviſion as not having the eſtate: your *Lordſhip* there conſidered eldeſt as youngeſt, *et e contra*, from the nature of the gift; which is a ſtrong inſtance: nor is this conſtruction confined to portions from a parent. Another head, on which the court has taken great latitude, is the death of a child before the portion wanted; implying from the nature of portions that a man would not burthen the eſtate; which is to ſupport the honour and name, for the ſake of adminiſtrators, who could not want portions; and therefore that they ſhould not be raiſed, though the words were ſtrong for veſting; as in *Tournay* v. *Tournay* and *Bruen* v. *Bruen*, both cited by Lord *Talbot* in *King* v. *Withers*; in which caſes if it was any other thing than a portion, as if a legacy out of a mixed fund, it would be raiſeable. On the ſame ground is *Warr* v. *Warr*, *Eq. Ab.* 268, though intereſt given in mean time, that will not make it raiſeable in caſe of portions; as held by your *Lordſhip* in *Boycot* v. *Cotton*, 24th *November* 1738; though it would in every other caſe. This latitude, the court rightly exerciſes, is not arbitrary; it is the more effectually to get at the meaning of the parties, to ſave it from blunders, and do juſtice; as that intent would be defeated, if the court did not imply a great deal from the nature of the thing. In a queſtion between adminiſtrator of a dead child and the heir of the family, the court leans in favour of the heir, not of a ſtranger. Between an eldeſt ſon and younger children, the eldeſt having the eſtate, the court leans in favour of the younger; becauſe if the eldeſt takes a ſhare with them, it is through miſtake, and not from intent; and on that inclination is *Doleman* v. *Chadwick* to be ſupported; for that ſeems a ſtrong determination, and would hardly hold in any other given caſe than that of portions; becauſe there was an abſolute appointment, whereby it veſted; and no power reſerved to appointor to controul that appointment, and con-

Per Cur. No queſtion, but where a proviſion is made by a father either by will or ſettlement for younger children, an elder unprovided for ſhall be deemed ſuch; and the ground is, that every branch ſhall be provided for, the court not conſidering the words *elder* or *younger*. Suppoſe this had been by marriage ſettlement, on the authority of the caſes cited, he would have taken as a younger child; and no diſtinction between marriage-ſettlements in ſuch a caſe as this, and where the ſettlement is by will or voluntary deed, where the proviſion has moved from a parent. The next queſtion is, whether any difference, where the ſettlement is made by a father's brother to a collateral relation, a nephew, *&c.* and it is manifeſt, that the brother, old *Richard*, meant to provide for all the branches of his family, and that every child of his brother *Thomas* ſhould have ſome proviſion. The difficulty ariſes on the introducing the word *younger*. It is rightly obſerved, that in the former parts the contingency is, if he ſhould have more ſons than one; which is, more than one who ſhould have the eſtate. *Younger* as a relative word without any antecedent is to be rejected, and the ſame as if it was to ſuch ſons, as ſhall be over and above one. No caſe comes up to this: yet they all are, that every child except the heir is conſidered in equity as a younger; and that elderſhip not carrying the eſtate along with it is conſidered not ſuch an elderſhip, as ſhall exclude by virtue of ſuch clauſes: and it would be hard, that the right of elderſhip ſhould be taken away, and yet not have benefit of it as a younger child.

ſequently according to *Hele* v. *Bond* in the *Houſe of Lords* it is irrevocable as well as any other deed: but it is allowed, becauſe it was a caſe of portions. It appears to be well thought of and well argued, and has received a ſanction in *Jermyn* v. *Fellows* from Lord *Talbot*, who without impeaching diſtinguiſhes another caſe from it. It goes a great way; and it is not neceſſary for the defendant to contend for ſo much: but it is ſtrong to ſhew, that the court ſays, the condition is annexed to the capacity of the taker; which if he does not anſwer at the payment, he ſhall not take. The preſent plaintiff became eldeſt, long before it was payable, and before he wanted the portion of a younger child; and if he had become eldeſt when a mere infant, it could not ſurely be the intent, that he ſhould have a ſhare of this portion. If the competition ſhould be not between the eldeſt ſon and younger children, but between the eldeſt and himſelf, that would be a different conſideration; which was Lord *Londonderry*'s caſe; where the queſtion was only, whether it ſhould ſink into the eſtate; and the reaſon, why it ſhould not, was from the words of the ſettlement; and no room to imply any thing from the nature of the portion; for the ſiſter was not at all affected by it. That caſe was governed on particular reaſons. In *Lomax* v. *Holmden*, 22d *July* 1749, your *Lordſhip* held, firſt ſon meant ſuch, as ſhould be eldeſt at death of teſtator; and the ſecond in birth came within that deſcription. In *Bright* v. *Norton* there were two daughters objects of the truſt: yet becauſe but one then alive, that one ſhould take the whole as an only daughter: whereas, if that other had lived to the time, when the truſt-money was to be paid, it would be otherwiſe. As to the inconveniences objected, allowing them in full force, the anſwer is, that the parties apply their proviſions to probabilities, not to poſſibilities. It was improbable, the children ſhould be married, or arrive to a great age during life of thoſe two old women: but, taking it in the ſtrongeſt light, it is but *Caſus omiſſus*; which is no reaſon, it ſhould be conſtrued contrary to the intent. That does not hurt an act of parliament; as the legiſlature might not have it in view. So *Lady Strangford* might not have this in view: otherwiſe would have provided for it. As to the objection from the death of all the children in life of *Lady Strangford* whether it would go to her or her repreſentatives, the ſame inconvenience would ariſe in the event, to which the plaintiff refers the veſting; for if they had all died in life of the father, it would have gone back in the ſame way, becauſe nothing veſted till death of *Lady Strangford*. This caſe is only ſaying, if any of the younger children ſhould come to be an eldeſt ſon, before the time ſhould happen, he ſhould not have it; which, if it had been ſo in terms, would have been approved of; ſo that there is no abſur-

Tal. 93.

Ante. *vol. I. p. 290.*

dity in it: and people often now inſert a clauſe of that kind, going into the language of the court in modern ſettlements: and ſo the family underſtood it, though they did not preciſely pen it ſo. Suppoſe an eſtate to *A.* for life, *&c.* in ſtrict ſettlement, remainder to *B.* till *A.* has a ſon, *B.*'s is a real veſted remainder, which he can convey as ſuch, and join in a recovery of it: and yet when a ſon is born, it is deveſted, and that recovery defeated. So that it is not its veſting, and going to repreſentatives ſhall prevent deveſting; which, though ſaid to be odious, is not unknown in the law; for it happens in every marriage-ſettlement almoſt; as in the limitation to all and every child it veſts, and deveſts on the birth of other children.

But ſuppoſing the firſt queſtion doubtful, the ſubſequent tranſactions are enough for the court to lay hold on from the family's ſettling this doubt; *Lady Strangford* being privy to defendant's marriage had on foundation of this portion, and full conſideration given for it. That indeed will not bind the right of plaintiff then an infant: but yet, poſſeſſed of all the family-eſtate, out of which his ſiſter has nothing, it would be hard to reſort to the rigid right. Then a little evidence would be ſufficient to ſhew, the plaintiff did not intend to have this: but he has acquieſced twenty years, and that not ſilently; being the hand by which the intereſt was paid to his ſiſter and her huſband, and procured her to pay the compoſition. Where one perſwades another to buy an eſtate, on which he has a mortgage, he will be poſtponed. The only anſwer is, that plaintiff knew not his own right: that ſhould be proved. Ignorance of fact will excuſe, ignorance of law will not. The miſtake muſt appear clearly, and be ſhewn how diſcovered. It will be preſumed, if he knew his right, he meant to give it to his ſiſter out of natural affection. The fact he muſt know, and then will be preſumed to know the law. He muſt have known his family-ſettlement, that his ſiſter has thereby no portion, and muſt have aſked, how ſhe came intitled to that portion. The bill was but in 1749; and the court leans extremely againſt demands after ſuch acquieſcence; on which the court lays more or leſs ſtreſs according to the nature of the thing and circumſtances.

LORD CHANCELLOR.

This is to be conſidered on two parts of the caſe. Firſt on the conſtruction of the declaration of the truſt of the term: next on the ſubſequent tranſactions, which are inſiſted on as a waver or acquieſcence on part of the plaintiff.

The

The firſt is the principal; it is material to determine the rights of the parties, admits of a large field of argument, and has been argued ſo as to take in a great variety of caſes and determinations in this court. It is certain the head of portions, or any other proviſion for children eſpecially younger children, admits of a greater variety of determinations here, and of judgments on circumſtances, than perhaps any other head; but in the preſent caſe it is not neceſſary to enter into all that. Though I cannot ſay, this is abſolutely free from difficulty, yet on the beſt conſideration and attention I am of opinion, the plaintiff is not intitled in equity to have this money raiſed for his benefit. As to the firſt head of caſes relating to legacies by will out of the perſonal eſtate, and the rules of the Eccleſiaſtical court in determinations of caſes on legacies, (which this court follows on legatory caſes) they are all inapplicable to the preſent, which has no relation to it; being a caſe ariſing not on a will, having nothing teſtamentary in it, but on a deed, on the truſt of a term, the conſtruction and execution of it in this court. Next alſo the rules, laid down and eſtabliſhed in this court as to ſums of money by way of portion or proviſion for children charged on land ſinking into the eſtate, theſe caſes and rules are not applicable; becauſe in reſpect of the preſent parties, and the rights they claim, I am of opinion, this muſt not be conſidered as a ſum of money charged on land. As to that point wherever this queſtion has ariſen, it has been between the owner of the land and inheritance, and the perſon claiming the benefit of the charge; and in all thoſe caſes, if the claimant of the money has died, before the time of payment has come, or the contingency happened, it ſinks into the eſtate, in favour of the owner of the inheritance of that eſtate. But the ſubject matter of the preſent conſideration is a ſum of money, which muſt in all events be raiſed out of the eſtate; for if none of the objects ſhould be in being, it ſhould not ſink into the eſtate, but be raiſed for the executors of *Lady Strangford*, who had a power over this eſtate, and created the term: ſo that the conteſt is between perſons claiming the intereſt of this as a chattel intereſt, and not with the owner of the inheritance ſubject to the charge: this therefore is out of thoſe caſes.

Where a charge ſinks into the eſtate.

The queſtion then remaining is, when this ſum of 5500*l.* according to the terms ſhall abſolutely veſt to all intents and purpoſes? Firſt this I muſt obſerve (which is a material part of the caſe, and uſed as an argument on both ſides, but cannot be an argument for the plaintiff,) *viz.* that here is no particular time mentioned in the deed, at which it is to veſt, not twenty-one or marriage; and that diſtinguiſhes it from *Butler* v. *Duncomb*; in which according to *Peer Williams* (where it is correctly reported)

1 Wil. 448.

the veſting before the commencement aroſe from thoſe words payable at twenty-one or marriage: but there being no ſuch words here, it is left at large, and muſt ariſe from conſtruction. The queſtion is then, at what time it is to veſt? Four times may be mentioned for that: firſt the time of the execution of the deed; for children were in being at that time: ſecondly the time of commencement of the term in poſſeſſion, the death of *Lady Strangford:* thirdly the death of the father: fourthly after the death of *Lady Strangford* and *Elizabeth Audley*, when the money was to be raiſed and paid.

Veſting not ſuſpended by power to appoint.

The plaintiff has ſuppoſed, this could not poſſibly be veſted at any time before the death of the father by reaſon of the power of the father. Now I do not know, that that neceſſarily follows; for it might be taken to be veſted in ſome perſon or other ſubject to his power of varying the proportions, it being to all the children, not to ſuch as he ſhould appoint; for if it had been ſo, it would be neceſſarily ſuſpended, and nothing could have veſted, till he had executed his power; which differs it from the late caſe of *The Duke of Marlborough* v. *Lord Godolphin*; therefore I do not ſee, (though I give no abſolute opinion on it) that it neceſſarily follows, that it is to be ſuſpended till the time of the death of the father; for his power would operate over it notwithſtanding.

In Ante, 26th November 1750.

But can the time of veſting be abſolutely at the time of the execution of this deed? There is one thing, the plaintiff's counſel have ſaid, which would make the conſtruction relate to that; for it is ſaid, that *eldeſt ſon* means eldeſt in being at the time of making this deed: if ſo, why ſhould not alſo *younger children* relate to the execution of the deed? Why ſhould one be confined thereto more than the other? If then it is not to relate to that, the true conſtruction muſt be a continuing eldeſt ſon at ſome period of time running on farther. To conſtrue this to relate to the time of the execution of the deed, and to veſt then, would be abſurd, and plainly defeat the intent, which was to take in all the younger children of her daughter: but to ſhew the uncertainty of veſting in caſes of this kind, ſuppoſe more younger children living than one, and it could have veſted, it would be ſubject to deveſt: and it is truly ſaid for defendant, that in all limitations whether of real or perſonal eſtate if it does veſt in the firſt born, on the birth of others it deveſts in order to anſwer purpoſes of families and intent of the parties: and in *Stevens* v. *Stevens* there was a great confuſion of that intereſt: and yet *B. R.* on a caſe made for that court held, it might be to anſwer the purpoſes and occaſions.

Limitations deveſting to anſwer occaſions and intent.

Tal. 228.

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As to the next time of veſting, the commencement of the term in poſſeſſion, was it to veſt in the children in being at that time? It is out of *Butler* v. *Duncomb*; becauſe in that caſe there was a particular time, twenty-one or marriage, which the court held neceſſary to compel the veſting at that time; nothing of which is in the preſent: but it would be a ſtrange conſtruction to ſay; it ſhould be abſolutely veſted to all intents, whenever the term happened to commence by death of *Lady Strangford*; for ſhe might have died in life of both father and mother: ſhould it veſt in the younger children at that time? Other younger children might be born afterward, who certainly ſhould not be excluded, but be let in by deveſting: but ſhould any part of it be veſted at that time? The conſequence would be contrary to the intent of the parties: *viz.* that if any of thoſe younger children in being at time of the commencement of the term had died in life of the father, the ſhare of that child would have gone to that father, who would have taken all perſonal rights veſted in that younger child; conſequently it would take out of the proviſion intended for the younger children, and give it to the father; which is ſtrong againſt conſtruing this abſolutely veſted at time of the commencement.

As to the third time, plaintiff inſiſts it ſhall abſolutely veſt in the younger children at time of the death of the father, and never deveſt. Conſider the conſequence of that: the father might die leaving a wife and children, ſome of them very young; and if this was ſo abſolutely veſted in them, on the death of any of tender years, the mother muſt have ſhared with the ſurviving children, and the money would be raiſed to the prejudice of the ſurvivors for benefit of the repreſentative. That would be contrary to *Bruen* v. *Bruen*, and to *Tournay* v. *Tournay*, where no time was mentioned, yet as the child died, before the time it could want a portion, and this was intended as a portion, it ſhould not be raiſed for the repreſentative of that child. This miſchief would happen, if it veſted at death of the father.

Portions not to be raiſed for repreſentative of child dying before he wanted it.

As to the next point of time, contended for on the part of defendant, for the veſting when the money was to be raiſed; and therefore compared to caſes of legacies, where there are no other words of gift or legatory words but the direction to raiſe and pay (as it is here) and that it cannot veſt before, being a gift at that time only; now I think, there may be a good deal of inconvenience in ſaying, that to no purpoſe or in no manner it ſhould veſt until that time; for if all the younger children had died in the life of *Elizabeth Audley*, who might have lived a good while, and it was never to veſt until then, it would have gone abſolutely to the eldeſt ſon; and though a younger child had married, and wanted its portion ever ſo much, according to that doctrine that child would be entirely defeated of

its portion and proviſion, though married and left children: nay that inconvenience might have fallen on defendant herſelf, for then if ſhe had died before *Elizabeth Audley*, and though her huſband relied on this portion, her family could have no benefit of it, and it would have gone to the elder ſon.

Then it is neceſſary for the court to take a middle way in the conſtruction of this declaration of truſt and in reſpect of the veſting, if the court can find it out. I will ſay once for all, notwithſtanding this is a voluntary proviſion for younger children by a grandmother, not by a father on marriage-ſettlement, yet I muſt conſtrue this proviſion, as the court will do proviſions by ſettlement on marriage of the father and mother of ſuch younger children; for it was plainly ſo conſidered by the parties themſelves; and with this view probably they truſted to her making a proviſion for the younger children; and ſhe did it: but did it as a parent providing for the younger children of her daughter, who were ſo nearly deſcended from herſelf: and a grandmother in this court is often conſidered as a parent. If then it is to receive the ſame conſtruction, what is the middle way to avoid all the inconveniences and many abſurdities, which would ariſe from conſtruing this money abſolutely veſted at any of theſe times? The ſame that was taken by Lord *Cowper* in *Doleman* v. *Chadwick*; which is the true way to avoid them. It is a very ſtrong authority, and the arguments properly urged there; for it appears to have been liberally argued and fully conſidered, and was conſidered as an authority by Lord *Talbot*; for he does not object to, or attempt to weaken it. Lord *Cowper* went plainly on this: he found it eſtabliſhed by the precedents and authorities of this court, that the words *younger children* had received a prodigious latitude of conſtruction to anſwer the occaſions of families and intent of the parties, often conſtruing an eldeſt daughter to be a younger child: that is carrying the words very much out of the natural into a foreign and remote ſenſe to anſwer the intent: and he found it determined, that an only daughter, though not younger in compariſon with another, ſhould be conſidered as a younger child, where a proviſion was made for younger children, and no other proviſion, and the eſtate limited to go over: and there have been caſes, where a younger ſon becoming an eldeſt under certain circumſtances has been conſidered as an eldeſt to exclude him from the benefit of the portion, and therefore the rule laid down by Lord *Harcourt* in *Beal* v. *Beal* has been, that younger children ſhall be conſidered ſuch, as do not take the eſtate, are not the head and repreſentative of the family: Lord *Cowper*, having found this, from thence inferred a tacit condition, that the capacity of being a younger ſon ſhould continue, until the time of payment came, and therefore made that determination, though the father had actually executed his power. Taking it *in abſtracto* merely as

A latitude of conſtruction to words younger children.

Such as are not head of the family, take not the eſtate.

The capacity to continue until time of payment, whether the power of appointment executed or not.

See post. 527.

an execution of a power, it could not poſſibly be maintained upon the general rules; for the rule of law is, that if a power is given to be executed, and is once executed in life of the party, and no power of revocation reſerved, it cannot be revoked and executed anew: it was ſo held in *Hele* v. *Bond* and other caſes: but the ground, Lord *Cowper* went on, was, that the continuing of the capacity to the time of the proviſion taking effect in point of payment, was a tacit or implied condition going along with the appointment. Now ſuppoſe, the father had executed his power in his life, appointing ſo much of this money to the plaintiff, ſo much to his ſiſter, and to the reſt if he had more children; and afterward the plaintiff by the death of his elder brother in the father's life had become eldeſt; and the father had executed a new appointment among thoſe, he thought, remained younger after that: that would have been directly good within this authority of *Doleman* v. *Chadwick*; for it is impoſſible to ſay, the firſt appointment ſhould take place, and the ſecond not, conſiſtent with this authority; which has ſtood, and ſo far allowed in *Jermyn* v. *Fellows*. Now how does the preſent caſe differ from that? For if this conſtruction of the power being executed *ſub modo* and the tacit condition is to be implied in the execution of the power, it muſt be implied in the direction in default of appointment, there being no difference between the one and the other, the objects being the ſame: the younger children cannot be conſtrued to mean one thing in caſe of default of appointment, and one thing in the execution of the power: it muſt be the ſame meaning in both: it follows equally, in the direction of what is to be done, and who is to take in default of execution. And though what Lord *Cowper* did, looks like taking a great latitude, and ſtruck one at firſt, yet on conſideration it was a very reaſonable conſtruction, made to anſwer the intent of the parties and avoid inconveniences and abſurdities, agreeable to the general grounds of the court in conſtruing the words *younger children*, in which a greater latitude is taken to anſwer the intent; for if Lady *Strangford* at the time of making this deed had been aſked, if ſhe meant, that a younger ſon becoming an elder, and having the eſtate, ſhould have part of this, ſhe would have ſaid *no*. It was truly ſaid, that in modern ſettlements people have been ſo cautious as frequently to inſert a clauſe and condition, that if any one of the younger children, provided for by the truſt of that term, came to be eldeſt, his ſhare of the portion ſhould go over exactly agreeable to the reaſoning of Lord *Macclesfield* in *Butler* v. *Duncomb*. This is very different from Lord *Londonderry*'s caſe, which has been truly ſtated; for there no conteſt was between him and his ſiſter, but between him and his own eſtate, he having been a younger child at the death of his father, and now come to have the ſettled eſtate: there was no perſon before the court to oppoſe it: nor was it much argued. The court, on conſideration that there had been many caſes,

in

Power, without revocation reſerved, once executed, not to be revoked and executed anew. *Sec. ante. 77. Sec. in Chan. 474. See my note & references there.*

in which a man had come to be owner of aneſtate ſubject to a charge for the benefit of the ſame perſon, where the court conſidered the eſtate and the charge to be different things, and directed the charge to be raiſed for his benefit, did it in that caſe; and particularly on this ground; that in the concluſion of the declaration of truſt of that term there were particular clauſes, on which the truſt thereof ſhould ceaſe, and this was none of them; and therefore, as there was none concerned to diſpute it, directed it to be raiſed: but it may hereafter perhaps be a queſtion between Lord *Londonderry* and his eldeſt ſon, if that ſon ſhould diſpute it. On the firſt point therefore I am of opinion, that the conſtruction on the truſt of this term according to the intent of the parties and the authority of *Doleman* v. *Chadwick* is with the defendant, and, I will repeat it again, what I principally rely on, is, as to that caſe, that there is no ſound diſtinction between conſtruing that tacit condition of the continuance of the capacity of a younger ſon in the execution of appointment of the power and in default thereof.

Infants may be bound, if conuſant of their right: as where tenant in tail aged nineteen ingroſſes a mortgage of the eſtate.

But if this is ſtrong, the ſubſequent tranſactions are very material. As to the marriage of defendant, the plaintiff being then an infant, and not at all, as far as appears by the evidence, conuſant of or encouraging it, nothing of that can bind him. It is an aggravation of the hardſhip of the caſe; but if people miſtake their right, and accept a conveyance, or ſecurity, or ſum of money with their eyes open, it cannot be helped. The plaintiff was then nineteen years of age; and if he had been privy to the tranſaction, unleſs he had been clearly ignorant of his right, it might have affected him; for there are caſes, wherein an infant may be bound. There was a caſe, where an infant of nineteen years old was an iſſue in tail, and ingroſſed a mortgage-deed of that eſtate; the court held, that act would exclude him, and would not ſuffer him to diſpute that by reaſon of concealing his right. But the next tranſaction is ſuch, as is a ſtrong affirmance of the right; for though it is a compoſition on the part of defendant's huſband with his father, it is a compoſition of the whole ſum; and the 3500 *l.* exceeded the ſhare, the wife would be entitled to upon the conſtruction contended for by the plaintiff. To have acted properly the plaintiff ſhould have acquainted her, that he had a demand on this ſum; but it is ſworn, that at none of the times mentioned of this tranſaction or receipt of the intereſt the plaintiff inſiſted on this right. Poſſibly the plaintiff had been ignorant of his right: but to make any thing of that it ſhould have been put in iſſue in the bill, and charged, that he was ignorant of his right; and it would have been very material to have charged, at what time the plaintiff came to the knowledge of this; which might have been very capable of proof. Nothing of that appears, but an acquieſcence, and receiving the intereſt for his ſiſter. I make no farther uſe of this but as a corroborating circumſtance to ſtrengthen the opinion given before; which would

would have greatly weighed in turning the ſcale, if the firſt point was more doubtful: and really, if this matter had been put in iſſue by the anſwer, I ſhould have diſmiſſed the bill with coſts: but not being ſo, the plaintiff had no opportunity to anſwer it.

I determine it conſequently on the firſt point, on which there is difficulty, as admitted on all hands; therefore the bill muſt be diſmiſſed without coſts.

Lloyd *verſus* Tench, *March* 6, 1750-1. Caſe 65.

At the Rolls.

ELIZ. BURKIN died inteſtate in 1748, never married, and having neither father, mother, brother, nor ſiſter: but ſhe left the plaintiff, daughter of her ſiſter, and the defendant *William Philips*, ſon of her brother, and the defendant *Sarah Barnard* her aunt, who took out letters of adminiſtration to her.

Aunt of inteſtate, where no brother or ſiſter, takes equally with nephew and nieces under *St. of diſtribution*, being equally in the third degree.

The conteſt was, between whom the reſidue of her perſonal eſtate was diſtributable; whether in moieties between the nephew and niece, or in thirds letting in the aunt for a ſhare?

Againſt the aunt was cited *Stanly* v. *Stanly*, 15 *May* 1739. where on a queſtion between the mother of inteſtate and the nephew and two nieces, all children of a deceaſed brother, *Lord Chancellor* held, they ſhould take with the mother. In *Wallis* v. *Hodſon* 1740. *Lord Chancellor* held, a poſtumous child, born after inteſtate's death, ſhould be held a brother or ſiſter of the inteſtate within the words of the *St.* 1 *J.* 2; which being a continuance of the *St. C.* 2. muſt be conſtrued, as if the *St. C.* 2. was repeated therein. In *Nelſon's Lex Teſtam.* it is held, that children of brothers and ſiſters ſhall exclude all other collaterals, as uncles and aunts; which is the preſent caſe. The ſtatute directs a diſtribution to the next of kin and their repreſentatives, which muſt be in the deſcending line; to which repreſentation the ſtatute puts a period after brothers and ſiſters children. 2 Wil. 344.

For the aunt. *Stanly* v. *Stanly* depending on the conſtruction of the *St. J.* 2; which was merely introductive of a new law, putting the mother on a *par* with brothers and ſiſters. *Wallis* v. *Hodſon* was ſo held, becauſe ſuch child has been always looked on as a child in being, ſo as always to take under the *St. of Diſtribution*: ſo on the city-cuſtom an infant in *Ventre* is looked on as a child, who takes a ſhare. The contending parties are all equally of kin to the inteſtate, being all in the third degree. If no brother or ſiſter re-

mains alive, but all leave children, they all take *per capita*: but where one brother or ſiſter is living, always a diſtribution *in ſtirpes*.

Sir *John Strange*, having taken time to conſider, now gave his decree.

On St. of *diſtribution* the rule of degrees of blood taken from the civil law.

Some things are ſo clear, they need only be mentioned: as firſt in all queſtions on the *St. of Diſtribution* the rule to go by in computing the degrees of proximity of blood muſt be taken from the civil law; and on this ground and foundation ſtand all the caſes, which have come in judgment ſince the *St. of Diſtribution* either at law or in this court. Next that, computing the degrees in this caſe by the rule of the civil law, the three contending parties ſtand in equal degree as next of kin to the inteſtate, *viz.* each in a third degree; and the computation muſt be in this manner: as to the aunt, the father is one degree, the grandfather a ſecond, and the aunt a third: ſo as to the nephews and nieces the father is one, the brother two, and nephew and niece in the third degree. Standing therefore in this light, obſerve, what direction the ſtatute has given as to the inteſtacy in queſtion; under the words of which the aunt, nephew, and niece, being in equal degree to the inteſtate, will be intitled to an equal ſhare, unleſs by any conſtruction put on this act, applicable to the preſent caſe the court is warranted to depart from the expreſs words, and exclude the aunt: but for this no ſufficient reaſon is offered. This was treated as a new caſe, never judicially before the court; and as ſuch, arguments are drawn from determinations made in other caſes on the ſtatute: but I have found, that in more inſtances than one the very point in queſtion has been before the court, and determined in favour of the uncles and aunts, admitted to an equal diſtribution with nephews and nieces. The firſt caſe is *Page* v. *Cook*, *Rolls*, 24 *June* 1742; for which the *Regiſter* has been ſearched, *Lib. B. fol.* 432; where *Samuel Davis* died inteſtate in 1729. without iſſue, leaving a widow, an uncle, and two nieces: the nieces brought a bill, inſiſting they were intitled to a diſtribution as next of kin excluſive of the uncle. The uncle by his anſwer inſiſted, he was intitled in equal degree with them, and had libelled in the Eccleſiaſtical court againſt the widow and adminiſtratrix, who brought a bill for an injunction therefore and to have the account taken. An injunction had been granted; and at the hearing the only queſtion was (for it was agreed, the widow was intitled to a moiety) whether the other moiety ſhould go to the nieces as next of kin, and exclude the uncle, or that the uncle ſhould have an equal ſhare with them. It was held by the *Maſter of the Rolls*, that clearly the nieces and uncle are in equal degree of kin, each in a third degree from the inteſtate computing according to the rules of the Civil law to the common anceſtor; the father one, grandfather two, and the uncle the third; ſo the father one, brother two, and the nieces third; and that the nieces, taking

as next of kin under the ſtatute, take *per capita*, and never *per ſtirpes jure repreſentationis*: which is a full authority in favour of the aunt, and anſwers the argument uſed for the nephew and niece, which was attempted under the admiſſion of repreſentation among collaterals of brothers and ſiſters children to draw it up to a repreſentation of the parent: but it is now ſettled, that though the children of one brother ſtand in place of the parent, in ſharing with the other brother, and take *per ſtirpes*, yet if no brother is alive, that repreſentation in *loco parentis* is at an end. *Walſh* v. *Walſh*, *Eq. Ab.* 249, among ſeveral other caſes. Another caſe expreſsly in point was *Durant* v. *Preſtwood* 30 *June* 1738, *Regiſter A.* 761, where the conteſt was between an aunt and uncle and nephew and niece: *Lord Chancellor* held, all ſhould come in equally for a ſhare in the diſtribution. After two ſuch authorities this queſtion is at peace: and could I entertain a doubt in my own mind (which I do not) I ſhould think myſelf bound thereby *ſtare deciſis*. In the great debate between a grandmother and aunt, *Blackborough* v. *Davis*, *Sal.* 251, and *Woodruff* v. *Winkworth*, *P. C.* 527, *Eq. Ab.* 249, it was determined in favour of the grandmother againſt the aunt, not becauſe the one was in the direct aſcending line and the other in the collateral only, but becauſe not in equal degree; the grandmother ſtanding in the ſecond degree to the inteſtate, between whom and the parent there is but one degree, and between that parent and grandmother another, which makes but two: but to reach the aunt there muſt be another degree from the grandmother to her, and ſo not in equal degree: but had the aunt ſtood in competition with the great grandmother, it would be otherwiſe: for the aunt being in the third degree, and there being a neceſſity to add another degree from the grandmother to the great grandmother, that places her as remote as the aunt, and therefore equal. *Mentney* v. *Petit*, *P. C.* 593. In the particular queſtion between the uncle and nephew, *Domat* indeed 1 *Vol.* 666. declares for the nephew: but owns, that others have thought the contrary, and that this is the rule only, where there are brothers to the deceaſed living, and excludes the uncle: but where there is only an uncle and nephew (which is the preſent caſe) they ought to ſucceed together, and that the ſucceſſion is ſo regulated in ſome places. This is agreeable to the opinion before, that all claim *per capita*. This is not the caſe of a brother or ſiſter to the inteſtate, but of the children of the brothers or ſiſters, where there is no brother to bring up the iſſue of the other to a repreſentation, but all ſtand in a proper degree, and take *per capita*, not *per ſtirpes*, merely becauſe they do not ſtand in light of repreſentation. If there is one brother living, and another has left children, however many, they take but a moiety with the brother: but if that brother had been dead, all in the ſame line of equality take *per capita*. I am therefore of opinion to adhere to the words of the ſtatute, which ſay, it ſhall go to the next of kin in equal

Grandmother takes before aunt, being in ſecond degree; great grand-mother equally with aunt in third degree.

Where no brother or ſiſter of inteſtate, nephews *per capita*: otherwiſe *per ſtirpes*.

equal degree, and to the above expreſs determination. The clear reſidue therefore of the inteſtate's perſonal eſtate ought to be divided into thirds.

Caſe 66. Hampſhire *verſus* Peirce, *March* 7, 1750-1.

At the Rolls.

Parol evidence admitted to explain a will, where doubtful; not to contradict.

ANNE DAVY by her will gave two legacies, one of 100 *l.* the other of 300 *l.* in this manner: "I give, direct, limit, "and appoint 100 *l.* other part of the ſaid truſt-money, to be paid "by my truſtees to the four children of my late couſin *Elizabeth* "*Bamfield* within ſix months after my deceaſe equally to be divided "between them: if any or either of them ſhould happen to die "under twenty-one or unmarried, their ſhare or ſhares ſhall go to "the ſurvivors of them."

As on a legacy to the four children of B. and afterward another to the children of B. B. having then two children by the firſt huſband, four by a ſecond; admitted to ſhew the firſt legacy is reſtrained to the four laſt children; not ſo of the other legacy.

The other legacy, which came at a great diſtance from the former was worded thus: "I further give, limit, and appoint unto the "children of my late couſin *Elizabeth Bamfield* the ſum of 300 *l.*"

At the time of making the will the ſituation of *Elizabeth Bamfield* was this: by a former huſband *Poddlecomb* ſhe had two children, the preſent defendant *William* and the wife of the preſent plaintiff: ſhe married *Bamfield*, by whom ſhe had four children, who were living at the time of her death and death of the teſtatrix.

Defendants inſiſted on reading parol evidence to ſhew, teſtatrix meant the four children by the laſt huſband *Bamfield*; as having been often admitted in ſuch caſes; as where teſtator gives 100 *l.* owing to him by *I. S.* it has been admitted to ſhew, it was the 100 *l.* owing by *I. N. I. S.* owing him nothing: ſo, where a legacy is greater than a debt, to ſhew it was not in ſatisfaction of a debt: and it is neceſſary to reſort thereto here to aſcertain that, which is doubtful.

E con. There are undoubtedly caſes, where parol evidence has been admitted to explain, whether teſtator deſigned the particular thing, as in the inſtances mentioned: but wherever it relates to letting in evidence whether this or that perſon was meant, it has been admitted only in the ſingle inſtance of a legacy to his ſon *John*, having two of the name. That was a great while held void for uncertainty: but courts of juſtice, leaning againſt that, let in particular evidence to ſhew, which teſtator meant: but it is confined to that. In *Caſtleton* v. *Turner* 27 *July* 1745. teſtator had made diſpoſitions in his will to ſeveral, and but two women mentioned throughout the whole

whole will, his wife and niece; and then he deviſed a particular eſtate *to her* for and during her natural life. The queſtion was, whether parol evidence ſhould be admitted to ſhew; which of the two was meant? It ſeemed to come as near the other caſes, as could be, yet *Lord Chancellor* would not receive it, thinking it an attempt contrary to the principles of the court, becauſe it would tend to put it in the power of witneſſes to make wills for teſtators; and held, that, though *her* was a relative term, it related to the wife upon the ground, that throughout the will in other places *her* ſeemed to relate to the wife: but expreſsly excluded the letting in extrinſick evidence to explain the will, which would occaſion uncertainty, leaving it to the expoſition of a ſervant, and then there would be no knowing where things would end. The ſtatute of frauds is clear, that an expreſs will in writing ſhall not be ſet aſide but by ſome other inſtrument in writing.

Sir *John Strange*.

Theſe two parts of the caſe fall under quite a different conſideration. The diſtinction as to admitting parol evidence I have always taken to be, that in no inſtance it ſhall be admitted in contradiction to the words of the will: but if the words of the will are doubtful and ambiguous, and unleſs ſome reaſonable light is let in to determine that, the will will fall to the ground, any thing to explain, not to contradict, the will is always admitted. So it is in the caſe of having two ſons of the ſame name; which has gone upon that as well as all the caſes; it being doubtful there which teſtator meant; and therefore, when admitted in that caſe, it is not to contradict the words of the will, but to let in light ſo far agreeable to the words as to enable the court to ſupport the act done. As to the 100 *l.* legacy: it is agreed, ſhe had ſix children; and it is not material whether they were by one husband or the other: but however that would be a proper ground to admit an explanation of this, what were the four children meant; for that does not contradict the will, but determines, which of the four children are to have that benefit. But as to the 300 *l.* whether the evidence goes to that or not, I will not give weight to it; for there the deviſe is ſo expreſſed as to take in the whole of the children. Whatever her intention might be, is another queſtion: I cannot go out of the will to admit it. The court has gone by the diſtinction beforementioned, and always cautiouſly admitted it: but as to the ſecond legacy it would contradict the will. Had I been aware of this queſtion, I could have mentioned caſes: but I remember one, where the executor made in a will was "*My* "*nephew Robert New:*" in the ingroſſment they had made it *Nune*. I am not certain, whether it was real eſtate or no *: but there evi-

* Said at the bar, that the rule was the ſame, whether real or perſonal.

dence was admitted, and on that he was declared to be the perſon. That was ſtronger than this; and it would hardly have done, if it had not been for the relative words *my nephew*; it appearing that he was his nephew, and that he had no ſuch nephew as *Robert Nune*. Therefore let it be admitted: but I will not give weight to it on the laſt legacy.

The evidence being read, his honour delivered his opinion.

As to the 100 *l.* which is an abſolute bequeſt, the plaintiff inſiſts, it is not diviſible between the four children, *Elizabeth Bamfield* had by her ſecond husband; but that, as ſhe, who is the perſon named and no notice taken of the husband, had ſix children, the word four ought to be rejected, and conſequently the two children by the former husband let in with the four by the ſecond: to prove which, ſtreſs is laid on the expreſſion *the four children*. I own, I ſhould have had ſome doubt on this part of the caſe, if it did not ſo entirely correſpond with the circumſtances and ſituation of the family at that time. Here were not ſix children by one and the ſame husband, as it was in *Tomkins* v. *Tomkins*, but two broods of children by different huſbands; therefore it was natural in pointing out the number to underſtand her pointing out that particular brood of number four; and ſo there is not that uncertainty, as if all the children had been by the ſame husband: but as there is ſome uncertainty, I have admitted the going into evidence to explain the intent of teſtatrix in the expreſſion *the four*, but excluded it as to the other legacy. The evidence laid before the court as to that is, that a woman-ſervant was ſent with inſtructions to ſome perſon to draw the will: but I lay little ſtreſs on that: but ſhe ſays, that the teſtatrix declared, (and that more than once, for ſhe declared it before the ſending the inſtructions) that ſhe had provided for Mrs. *Bamfield*'s four children. Now though the expreſſion in the will might take in thoſe by the firſt as well as the ſecond husband, yet this (which I think, is proper evidence) ſhews plainly, that her declaration was the four children of Mr. *Bamfield*, thoſe he had by this wife; which explains, what ſhe meant by *the four children*: but ſhe alſo puts a negative on the other two, ſaying that ſhe would not give to the others, being the *Poddlecombs*, any thing, becauſe their own father had given them a good fortune. So that taking this on the face of the will, in which alſo the circumſtances of the family muſt be taken altogether, it appears clearly, that the four children by the ſecond husband were thoſe meant to ſhare this 100 *l.* Though no very great ſtreſs is to be laid on that clauſe of ſurvivor, yet in a caſe of this nature ſome argument may be drawn from thence. The four children by *Bamfield* were all minors: the two children by *Poddlecomb* were both of age at that time. The teſtatrix put the caſe ſo as to take in the poſſibility, that any one of the four might die under twenty-one, which the other two then could not. I ground myſelf much upon that correſponding

reſponding ſo exactly with the number mentioned here: nor is there room to think, the teſtatrix did not know the number of children, *Elizabeth Bamfield* had by her husband. So that the plaintiff or her brother have no ſhare as to that legacy of 100 *l.*

The other legacy ſtands on a very different foundation; and I cannot be warranted, (whatever one might ſuggeſt to ones ſelf to be the intent) to depart from the words of the will, they taking in beyond diſpute all the children of *Elizabeth Bamfield*; ſo that I cannot conſtrue it reſtrictive to the four; for which there might have been a foundation, had there been any words of reference of any ſort to thoſe four children, provided for by the 100 *l.* but there are none throughout. Had this followed immediately after the 100 *l.* legacy, and no other uſe had been made of the word *further* throughout this will, than what is contended for by defendants, there might be ſome room poſſibly to have reſtrained it: but it is at a great diſtance. It is a common expreſſion in every will, being an inchoation of a new deviſe, having no reference, as if wrote in a diſtinct paragraph, and introduced with the word *item*. It is not to the *ſaid* children; which might reſtrain it to the four: but it muſt be conſtrued all the children. It is material, that where teſtatrix means to give to the ſame perſon more, than ſhe has given before, ſhe has uſed the word *ſaid*; which ſhews, ſhe meant not to reſtrain this to the ſame objects, to whom the 100 *l.* was given, by not uſing the ſame expreſſion: nor is any ſtreſs to be laid upon her calling her by the name of *Bamfield*. It is dangerous in queſtions of this nature to depart from the plain words of the will, or admit any evidence to contradict them: therefore I admitted the evidence as to the 100 *l.* but would not apply it to the latter part; in the other it being only explanatory, in this contradictory. It is ſaid indeed, that the evidence read is adapted to defeat the plaintiffs demand as to both legacies. It may be ſo meant by the party: but it is the duty of the court to diſtribute and divide; to regard it ſo far as it is apt and legal; where not ſo, it is not binding on the court as to that.

The bill therefore muſt be diſmiſſed as to the 100 *l.*

Dixon *verſus* Parker, *March* 8, 1750. Caſe 66.

Evidence.

A Queſtion aroſe on a point of evidence, whether the depoſition of *John Garland*, one of the defendants, could be admitted to be read as evidence on part of the other defendant *Parker*.

Depoſition of one defendant not read for another, as concerned in intereſt and as a decree might be againſt him.

The whole of it aroſe upon an agreement between *Garland* and the plaintiff reduced into articles in writing under their hands and ſeals; which was for the ſale of plaintiff's eſtate to defendant *Parker* for 300 *l.* but the covenant was by *Garland* with the plaintiff, and *Garland* was the perſon bound in the penalty for performance. The

The bill charged, that there was a draught of a defeaſance made, intended to be executed: but that by contrivance and management of *Garland* it was not executed at the ſame time with the deeds, but put off to another time; and that *Garland*, having got the abſolute conveyance, would not let the defeaſance be executed.

For defendant Parker in ſupport of the evidence. *Garland*'s being a party is no objection to his depoſition, if not concerned in intereſt. It appears by the agreement in writing, he acted only as agent or land-ſteward for *Parker*, deſcribing himſelf as ſuch; and therefore to be conſidered merely as a broker for him, and not at all intereſted. The conveyances are to *Parker*, in whoſe behalf the contract was. No decree can be made againſt *Garland* on the merits, and then there can be none againſt him for coſts; for one can never come here to pray a decree for coſts only, no more than he can come into this court to pray a fine. This was fully conſidered by your Lordſhip in the caſe of the conſpiracy charged on Sir *John Cheſhire* and his lady, where ſhe was offered to be examined as a witneſs: firſt her being a defendant was held no objection; for even a court of law allows a defendant's being a witneſs: it was next objected, that ſhe might be ſubject to coſts, if the fraud was proved; but the court held, ſhe had no eſtate in her, nor was ſhe concerned in intereſt, and therefore her evidence was read. Then it is very extraordinary and dangerous, if a man's ſervant or agent cannot be examined as a witneſs for him. This is like the caſe of a broker or *Blackwell Hall* factor; who, if they ſell goods or ſtock even without naming their principal, yet an action may be brought in name of the principal; and that broker or factor may be examined as a witneſs. Otherwiſe people would be ſtript of their evidence; which will be the caſe here, if the court prevents this being read. Though *Garland* has himſelf examined ſeveral witneſſes, that is his own act, and is not to prejudice the party, who would call him.

Coton v. Lutterel.

Lord Chancellor ſeemed to be very clear, that a defendant, ſo circumſtanced as this was, was never ſuffered to be read: but there being no other evidence relating to the tranſaction of the contract, which made it of great conſequence to the defendant *Parker*, and it being very much preſſed, and the caſe of Lady *Cheſhire* inſiſted upon, ſaid, he would look into it; and the next day gave his opinion.

On objection to competency, never read: if to credit only, read, and left to conſideration of court.

Conſidering the nature of this caſe, and that the only evidence of fraud and impoſition, ſuch as it is, is againſt the defendant *Garland*, it would be pretty wonderful, if he could be read as a witneſs in the cauſe: but that however muſt be determined by the rules of law: if according to them he ought to be read, it muſt be ſo. The queſtion is, whether the objection made, goes to his competency or credit; for if to his credit, it muſt be read, and left to the conſideration of the court

court on the whole evidence of the caſe: but not at all, if it goes to his competency? Whether it is a good objection as to his competency, depends on two things; firſt the concern or intereſt he appears to have in this cauſe and contract; and next his being a defendant now before the court and concerned in the event of the ſuit. As to the firſt, all the ſubſequent tranſactions ariſe out of this contract; and whether that was fairly obtained, and all the ſubſequent tranſactions fairly and properly founded on it, is the queſtion. Taking it out of that propoſition put for the defendant, that *Garland* was not at all intereſted, and that it would be extraordinary, if one's agent might not be examined as a witneſs for him, it is extraordinary to be ſure: but conſider, how it ſtands. If any remedy was to be taken either at law or equity (and the rule is the ſame here as at law on theſe articles) it could not be maintained for or againſt *Parker*: but if the plaintiff inſiſted on a performance, he muſt have brought an action of covenant for non-performance againſt *Garland*: he could not againſt *Parker*, if he proceeded for the penalty: it muſt be by action of debt for that penalty againſt *Garland*: and if the agreement has not been rightly performed, that action for the penalty, I am of opinion, may be now brought againſt *Garland*. This ſhews, that notwithſtanding he has deſcribed himſelf as agent or landſteward for *Parker*, that differs it not at all as to this contract, it is his contract; and in my opinion *Parker* was not bound to indemnify him upon *Parker*'s own anſwer; which anſwer is, that the propoſal was for a loan, and not at all for a purchaſe; and that no authority was given to *Garland* to purchaſe the land for *Parker*, the general authority relating to a loan; and therefore, if after *Garland* had contracted for a purchaſe (as is inſiſted on) with the plaintiff, if *Parker* had ſaid, he would not be bound by this, and would not take the purchaſe, he might have done ſo. Then it is really a contract by *Garland*, taking upon him indeed to act for *Parker*, but without authority as to this. It is compared to the caſe of a broker or *Blackwell Hall* factor. I agree, that, which is inſiſted on, is allowed; but it is with jealouſy allowed, and with great inquiſitiveneſs by the court as to the circumſtances. It is allowed from the regard to trade and commerce, ſingly on that ground; for there is ſome danger in allowing it: but that is not at all like this caſe. If ſuch broker or factor at the time of making the bargain declares his principal, no action can be brought againſt the broker or factor; for that was notice to the party, that he acted as broker or factor; and the action muſt be brought againſt the principal, if he declared him at the time. Now though *Garland* did declare his principal here, no action could be brought on this contract againſt *Parker*, becauſe the contract is of ſuch a nature, as it could not be endured, it concerning lands and tenements, *&c.* and there is another difference from the circumſtances of the fact, that *Parker* having in his anſwer expreſsly ſaid, that

Broker or factor, not naming principal, may be examined on action in name of principal: but ſingly on regard to trade.

If principal is declared, action muſt be againſt him.

the notice to him was concerning a loan, not a purchaſe, and the direction given that he would act as for a loan, it is only the ſubſequent ratification of *Parker* afterward, that can charge him. That is not the caſe of the factor or broker, who if he ſells cloth or ſtock without declaring his principal, in his own name, the action might be brought in the name of that other perſon: but if he did not act for him at that time, no ſubſequent act could charge him: for that would be a parol contract aſſigning that choſe in action to another perſon, which he could not do: and therefore he muſt act concerning the goods of another perſon at that very time of the tranſaction, otherwiſe no ſubſequent conſent or agreement of that other perſon can intitle him to bring, or ſubject him to, an action upon it. On that ground therefore *Garland* is not a competent witneſs. But there is another head; as he is a defendant in the cauſe: and though on the firſt ground the rules of law and equity are the ſame, yet on this they differ. Where there is a defendant in this court, if notwithſtanding that he is not concerned in intereſt, either ſide may examine him as a witneſs; and therefore the plaintiff, though he has made a perſon defendant, whom he wants to examine as a witneſs, may, on ſuggeſtion that he is not concerned in intereſt, obtain an order for it, ſaving juſt exceptions; and ſo may a co-defendant. As to the plaintiff's examining, the rule of this court goes farther, than the law does; for by the law no plaintiff can examine a defendant as a witneſs; as was ſolemnly determined by *B. R.* in a caſe, * when *Trevor* was Attorney General, on a trial at bar of a libel publiſhed at *Briſtol*, where ſeveral defendants were made, and the Attorney General could not make out his caſe without examining ſome of thoſe defendants brought before the court. *Holt C. J.* would not let the crown do that, though, he ſaid, they might be examined for co-defendants, but that the crown could not: the Attorney General thereupon entered a *noli proſequi* at the bar, and on that examined them as witneſſes; which ſhews, the rule of this court and of law differs as to that: but as to co-defendants examining it is much the ſame; for there if in actions on *torts* (which are always ſeveral) ſeveral defendants are made, (however they are made defendants, whether with a *ſimul cum* or otherwiſe) if the plaintiff gives no material evidence againſt them, the other defendant may examine as witneſſes upon that ground, that the plaintiff by making unneceſſary defendants is not to ſtreighten defendants in point of evidence: and ſo it may be done by order in this court, ſaving juſt exceptions. But that is in a caſe and upon a ſuggeſtion, that the defendant, whom they would examine, is not concerned in intereſt in the cauſe: which brings it to the queſtion, whether *Garland* is ſo concerned? It is inſiſted, that he is not, for that it is a contract in behalf of, and the conveyances are to, *Parker*; and that there could be no decree againſt *Garland*; and if no decree could be againſt him on the merits, there could be no

Broker or factor muſt act for another at the very time: no ſubſequent conſent or agreement will do.

Where the rule of law and equity as to evidence is the ſame: and where they differ.

At law a plaintiff can't examine a defendant, as plaintiff in equity may; but co-defendants may, if there is no material evidence againſt that defendant, and not intereſted.

* (ſaid to be Medway v. Iſdel.)

decree for coſts, for one can never come here to pray a decree for coſts only. I do not know, whether that is ſtrictly ſo: but I will take it for granted to be ſo: but there may be a decree in this court againſt *Garland* the tranſactor. Where bills are to ſet aſide conveyances, there may be a decree not only to convey, but that deeds and writings be delivered up, if the merits of the caſe are ſtrong enough, (as to which I give no opinion now;) and that decree may be made againſt *Garland*. If *Parker* was likely to abſcond (not that I ſay, there is any probability of that) the decree would be againſt *Garland* to procure the act to be done. Where deeds are obtained by fraud and ill practice, and the legal eſtate is placed in a third perſon, a decree has been againſt that third perſon to procure the act to be done. Suppoſe *Parker*, in whom the eſtate veſted by theſe deeds, had been out of the kingdom, and *Garland* only here, the plaintiff could have brought a bill againſt *Garland* upon the equity, it is now brought for, (provided he proved it) on a ſuggeſtion that *Parker* was out of the kingdom, and therefore could not be brought before the court and he might have had a decree againſt *Garland* only for this relief, he now ſeeks, as the perſon who tranſacted the whole: ſo that as there was a plain method for a decree againſt him, it cannot be ſaid, there could be no decree againſt him on the merits, and therefore no coſts could be decreed againſt him. But the great objection was on the caſe of *Coton* v. *Lutterel*; and if it had not been for the citing that caſe, (all the circumſtances of which I did not remember) I ſhould not have reſerved this point to this day. It was heard before me on 6 *June* 1738; and it was a bill againſt Mr. *Lutterel* and his wife, the half ſiſter of the deceaſed Mr. *Coton*, (whoſe ſettlement was in queſtion) and againſt Sir *John Cheſhire* and his wife, (but this was after Sir *John*'s death) to be relieved againſt a ſettlement made by Mr. *Coton*, which was ſuggeſted to be obtained by fraud, impoſition, and menaces on him, and to have a reconveyance and account of profits. There was a great deal of evidence in the cauſe; and one part was endeavoured to be fixed on Lady *Cheſhire*, who was alſo made a defendant, that ſhe was aunt to Mr. *Coton*, uſed to come to his chambers in the temple, and had threatened and menaced him to make ſuch a ſettlement, and that under that terror he had done it, which he was afterward very ſorry for. It was ſworn in the depoſition of *Haws* and of *Nelſon*, that they were at his chambers, when Lady *Cheſhire* came up ſtairs, and wanted to ſpeak with him; whereupon he bid them go into an adjoining room, where they ſtaid, and overheard the converſation; the effect of which they put down in writing in a paper, and ſwore to this particular paper, which did contain ſeveral extravagant things, ſuch as threats by her, particularly that ſhe had found a flaw in his title, which ſhe would diſcover, if he would not comply. Before this cauſe was heard, a diſcovery was made relating to bad practice, which was heard before me on motion to ſuppreſs the depoſition and to commit the perſons; and upon that I was of opinion,

Whether one can come into equity for decree for coſts only, Q.

opinion, that *Haws* had been guilty of groſs abuſe, that this paper was a dreſſed up thing after the tranſaction, and by combination, and *Haws* was ordered to ſtand committed: but he fled. As to *Nelſon* the ſame imputation was on his depoſition, as it was to ſupport the ſame paper: but he was not ordered to ſtand committed; and I refuſed to ſuppreſs the depoſition: but this ſtood over to the hearing of the cauſe, and theſe two depoſitions were read. When the defendants came to make their defence, they read the depoſition of *Guidot*, clerk to Sir *John Cheſhire*; who gave a clear, diſtinct, account of the inſtructions, he received from Mr. *Coton*, Lady *Cheſhire* not being by, and Sir *John* only conſulted in it as counſel: theſe inſtructions were repeated, and a great interval of time and conſideration taken: and a ſubſcribing witneſs was alſo examined and read. After reading this and entering into the conſideration of the objection to the depoſition of *Haws* and *Nelſon* the queſtion was, whether the depoſition of Sir *John* and Lady *Cheſhire* ought to be read? I was of opinion, it ought; for neither of them were parties to the deed; no decree could be made againſt them; and I was of opinion, that on all the circumſtances there was no material evidence againſt either. There was no pretence againſt Sir *John*; and the court could not lay weight on that evidence. In a caſe where co-defendants examine, the queſtion is not, whether any *Scintilla* of evidence is given, but whether material evidence, ſuch as the court or a jury would lay weight on? So here the office of judge and jury is veſted in this court on hearing the cauſe; and if the court thinks, there is no material evidence againſt that defendant from the nature of the fact affecting him, or from the credit of the witneſs who has ſworn it, he will be read: otherwiſe the defendant would be cut off from having the benefit of his witneſs merely from the ill practice of the other ſide. But another circumſtance makes this different from that caſe. No evidence was examined there on behalf of Sir *John* and *his Lady*; but here *Garland* has examined ſeveral witneſſes, and ſo far has judged himſelf concerned in intereſt: then it cannot be ſaid, that he is not ſo. If there appeared any colluſion between the plaintiff and *Garland*, it is true, that would not prejudice the party, who would call him; or if there was any ground to ſuſpect it, I ſhould be of opinion, that notwithſtanding his examining witneſſes he ſhould be read. But there is no ſuch ground; far from it: it is the joint defence of *Garland* and *Parker*, and ſome of the depoſitions on the part of *Parker* cannot be made compleat without reading the depoſitions on the part of *Garland*. It is clear, there never was an inſtance in this court of ſuch a defendant being examined as a witneſs; therefore he is not to be read.

Depoſition of co-defendant read, where no material evidence againſt him, and no decree.

Defendant by examining witneſſes has judged himſelf intereſted: yet read if colluſion with plaintiff.

But

But really there are ſeveral circumſtances in this caſe having the appearance of hardſhip. On *Parker* there is no imputation; it ſeems to be the act of his ſteward. But the bill is not adapted to this caſe, but to another; charging expreſsly that there was a preparation, not an execution, of a defeaſance, which was taken into the cuſtody of *Garland*, who hindered the execution; and on that head is the relief prayed; which would make it the caſe of a mortgage with defeaſance, as the old way of tranſacting was. It is determined on the ſtatute of frauds, that if a mortgage is intended by an abſolute conveyance in one deed, and a defeaſance making it redeemable in another; the firſt is executed, and the party goes away with the defeaſance; that is not within the ſtatute of frauds. But the plaintiff muſt both prove and allege; not alledge one thing, and prove another: that is the difficulty; and therefore, I fear, it will run out into a trial at law; which would be a great expence between the parties, and ſhould rather be avoided by ſome ſort of compenſation given by *Parker* to the plaintiff. This I do not propoſe on a ſuppoſition, that *Parker* himſelf has done wrong: but that the perſon, he employed, has not uſed him well: and it is merely to avoid future expence; for could I foreſee, that I could make a final decree, as it ſtands, I ſhould not propoſe it.

If defeaſance to mortgage is taken away, and not executed as intended; not within ſtatute of frauds.

Robinſon *verſus* Robinſon, *March* 9, 1750-1. Caſe 67.

GEORGE ROBINSON deviſed an eſtate to truſtees and their heirs for a particular purpoſe, and afterward to *Lancelot Hicks* for his own life, and no longer, directing him to take the name of *Robinſon*; and after his deceaſe to ſuch ſon as he ſhould have, lawfully to be begotten, taking the name of *Robinſon*; and for default of ſuch iſſue then over to the teſtator's couſin *William Robinſon* and his heirs for ever.

Burrow 38. Deviſe to H. for life and no longer, taking name of R. and to ſuch ſon as he ſhould have, taking the name; for default of ſuch iſſue, over: an eſtate tail male in H.

Teſtator died leaving *William* his heir at law, and *Hicks* who had then no child at all, and who brought a bill to have incumbrances diſcharged, and to have the eſtate; which was heard in 1733 by *The Maſter of the Rolls*, who decreed it to be an eſtate for life only, and that only one ſon was intitled by virtue of this will to an eſtate for life, and that the next immediate remainder was to go to *William* in fee.

Lancelot Hicks had a ſon, who died two years old: he had alſo another, who after his father's death brought this bill claiming this eſtate.

For plaintiff. The general view certainly was to perpetuate his name and eſtate in the male line of *Lancelot Hicks*, while he ſhould have ſons capable of performing the condition, and who ſhould perform it; but could not fix it in one particularly, as he could not ſay, which of the ſons would or would not perform; he therefore left in ſome uncertainty as to which ſhould take, not uſing any words neceſſarily confining it to one particularly, as *eldeſt* or *one*. Although teſtator has tied it up to an eſtate for life, yet on a limitation for life, remainder to the 1ſt, 2d, or 3d ſon, ſtopping there, the court has contrary to the general rule held it ſufficient to give an eſtate tail by implication; as otherwiſe a 4th ſon would not take, but it would go over, although it could not be preſumed to be the intent to cut off a branch of the family not in being. The whole muſt have been in view, eſpecially where the father was to take the name; ſo that it ought to be conſtrued, that while there were any of the male line, who ſhould take in tail male, it ſhould not go over even to heir at law. The aſſuming a name is an act of diſcretion, ſo that it cannot be exerciſed but by one of years of diſcretion, and could not be meant the firſt ſon, who might be but a year old: the ſubſequent words explain *ſon* to mean *iſſue male*. The eſtate could not veſt till ſuch a time after death of *Hicks*, as there was an object, who could perform or reject the condition. When a condition is annexed to the perſonal act of the party to take, it always qualifies or ſuſpends the veſting, till he does the act required, or ſomething againſt it. The intent is indeed to be collected from the words of the will: but in many caſes the court has done, what is ſtrictly perhaps adding words, that is by way of conſtruction and ſupplying words, as if teſtator had uſed them. In *Coriton* v. *Hellier* * your *Lordſhip* ſaid, the court muſt find words in the will, and did ſo, varying the conſtruction, and holding that what was ſtrictly and abſolutely a term for ninety-nine years, was determinable on death of firſt taker, as otherwiſe it would be contrary to intent of teſtator: but it was from all the words in the will, not looking for words directly correcting the former expreſſion, but upon the whole. The decree has left it ſufficiently open: it does not direct a conveyance; the omiſſion of which was with a view to wait till the death of *Hicks* to ſee, what ſon would perform the condition. Though it has confined it to the firſt ſon, it was to ſee, who would be that ſon: ſo that within the decree plaintiff may take as the only ſon of *Hicks* capable at his death to perform it, and take an eſtate tail.

* Cited ante in *Taygues* v. *Puget*, 10th *Auguſt* 1745.

For defendant William. Teſtator has not in words executed, what, it is likely, he meant: *quod voluit, non dicit.* But the queſtion

queſtion is, what is his meaning out of all the parts of his will. It is eſtabliſhed, that the law of *England* ſuffers not a will to be conſtrued by probable conjecture of circumſtances out of it, though ſuch as no one can doubt of. The words of a will may be conſtrued by highly probable circumſtances ariſing from another part: but there muſt be words: an imperfect part may be ſupplied by another part. In this the law of *England* differs from the latitude taken in the latter time of the *Roman* law. Your *Lordſhip* in *Bellaſis* v. *Othwait*, 11th *February* 1737, notwithſtanding a ſtrong inclination to the contrary thought yourſelf tied down by theſe eſtabliſhed rules. There a fond mother made a will in great haſte (as on the face of it appeared) leaving to her only child a daughter, all her real and perſonal eſtate: but if ſhe died before of age to diſpoſe of it, then to a charity: if ſhe died unmarried, then to her own ſiſters. Her only daughter married, had a child, and died above twenty. The queſtion was, whether in that event the eſtate went over? It could not be thought, ſhe intended to diſinherit her daughter; meaning it ſhould go over to the charity, if ſhe had no occaſion for it; and a famous anſwer of *Papinian*, *Lib. Dig.* 35, *Tit.* 1, *Sec.* 102, (much applauded by *Domat*) was cited, where a will was to be conſtrued by probable conjecture: the court went as far as poſſible, giving the perſonal eſtate becauſe ſhe came of an age to diſpoſe of it: but your *Lordſhip* thought yourſelf tied down by the deviſe to the charity, becauſe you could not put in the words, *if ſhe died without iſſue*, although ſorry to determine ſo; ſaying that the arbitrary conſtruction and latitude, taken in the latter time of the *Roman* law, was not to be received here; but the meaning was to be taken out of the will, that is out of the whole context. A will was preſumed to be revoked by the *Roman* law *Conjecturæ Pietatis* from a change of circumſtances; *Lug* v. *Lug*, *Sal.* 592: but it may be doubted, whether that is the received opinion of the Eccleſiaſtical law now: for unleſs there is ſome parol evidence beſide, they do not allow a revocation barely from circumſtances: and there is a ſtrong authority ſince, where that was not ſufficient to revoke. No ſuch change would be allowed as to real eſtate to operate as a revocation: and in *Magot* v. *Magot*, where was deviſe of real and perſonal, your *Lordſhip* on authority of *Lug* v. *Lug*, gave liberty to apply to the Eccleſiaſtical court as to the perſonal; but ſaid, as to the real, no change of circumſtances would revoke. In *Coriton* v. *Hellier* * your *Lordſhip* expreſsly laid down, that the court could not go on conjecture out of the will, but muſt find words in it; and went on this, that there was ſufficient on the whole will to ſatisfy the court, ſuch

* Lord *Chancellor* ſaid that caſe depended on ſo many circumſtances, it could not be a precedent in other caſes.

was

was the conſtruction. The intent is to prevail, where it appears plainly on the face of the will: where it does not, the court will reſort to the legal operation of the words. The queſtion then is on the words of the will, taking the whole together, whether there is any thing intitling plaintiff to an eſtate, and an eſtate tail as he claims; for there muſt be a direction for a conveyance?

LORD CHANCELLOR.

That is the principal conſideration, in what manner the conveyance ſhould be framed; whether there ſhould be truſtees to preſerve contingent remainders or not.

For defendant. There is no occaſion for the intervention of them where there are truſtees, according to a late caſe. It is firſt to be eſtabliſhed, that here is a certain deviſe; for if the court cannot tell, to whom deviſed, it is void for uncertainty, whether it is a truſt or legal eſtate; for a truſt reſults, as well as a legal eſtate deſcends. What ſon is meant? There might have been ſeveral. It was a neceſſity of this ſort, that forced the conſtruction of the firſt ſon at *The Rolls*; and there is no ground to determine different from the opinion there given. The court cannot aſcertain it, but muſt put a conſtruction in favour of the will and ſay, *ſuch ſon* muſt mean ſomething. This is like the caſes, where it is neceſſary for the court's putting a conſtruction on it to prevent its being void for uncertainty. *Ray.* 82. This is plainly a deviſe to one ſon, and no words beyond that, as ſucceſſively, *&c.* The limitation is omitted, and the court cannot ſupply it. It is void, unleſs by reducing it to the deſcription of the eldeſt. This being a remainder, the moment a ſon is born anſwering the deſcription, it muſt veſt; which is a valuable intereſt, though his father's life in being. It is not to wait the poſſibility of another ſon getting the name before. There are no words that it ſhall ſtay, till the ſon is twenty-one: then it once veſting in the eldeſt, unleſs the plaintiff can come within the deſcription, he can never take it as a ſucceſſive remainder.

LORD CHANCELLOR.

Ante 22d *July* 1749. Something of this kind aroſe in *Lomax* v. *Holmden*; and ſuppoſe he had ſaid *eldeſt ſon?*

For defendant. As ſoon as a ſon is born, it is no contingent but a veſted remainder in him. It is diſtinguiſhable from *Lomax* v. *Holmden*; for there the firſt ſon was born and died in life of teſtator, ſo never was in being at the time, he was to take: and there

there your *Lordſhip* ſaid, the ſecond ſon was in view of teſtator: here only the eldeſt was. If it was only an executory deviſe to the firſt ſon of *Hicks*, that ſhould be born, without an eſtate for life in the father, as ſoon as born it is a veſted intereſt, and takes effect: then much more ſhall a remainder take effect: for an executory deviſe is in its own nature a contingency, and more liable to be changed.

LORD CHANCELLOR.

Suppoſe, the firſt born ſon had come of age, and renounced the name of *Robinſon*, which his father took?

For Defendant. The eſtate would be forfeited. But what is there to give more than an eſtate for life, ſuppoſing a ſon now in being to anſwer that deſcription? The court cannot add words of limitation, however probable the conjecture of the intention. *Such iſſue* muſt refer to ſome body before mentioned; which muſt be the father's; and then cannot give the ſon an eſtate tail by implication. *Son* is never conſtrued as *nomen collectivum*, as *heir* is in law, and as *iſſue* is in common uſe; unleſs there is ſomething on the face of the will to make it collective, for probable conjecture will not do ſo. An eſtate tail by implication would contradict the expreſs affirmative and negative words of the will; and is never allowed, where words of that kind are added, as where *for life*, or *et non aliter*. *Rol. Ab.* $\frac{837}{8}$; and *Backhouſe* v. *Wells* *, *Eq. Ab.* 184. Expreſs eſtate for life is not turned into eſtate tail by implication in *Bampfield* v. *Popham*, 1 *Wil.* 54. though the ſtrongeſt caſe for it from the recital in the codicil. Where the court has done it, the intent muſt be clear, that without violating it the court could not do otherwiſe: as in *Eq. Ab.* 185, and 1 *Will.* 754. It cannot now be inſiſted, that plaintiff claims an eſtate tail under his father, and not by deſcription to himſelf, being already determined againſt the father, and acquieſced in.

LORD CHANCELLOR.

I will not give an opinion at preſent; it deſerves to be conſidered in reſpect not only of the caſe, but alſo of the authority of the former decree: and though undoubtedly on the firſt point, where the plaintiff contends to be a remainder after a bare eſtate for life in the father, plaintiff is not bound by that decree; yet it is certainly a conſiderable authority of the judge, who made

* His *Lordſhip* ſaid, he was preſent, and that the ſtrength of that reſolution was upon the word *only*.

that decree, not lightly to be paſſed over, but requiring attention; and, I ſhould think, Sir *Jo. Jekyl* would hardly have made ſo ſolemn a determination, if it had not been fully argued. But one thing I will mention, occurring to me on the conſtruction of this will, and not particularly argued at the bar, though it reſults from the argument. To be ſure it ſounds extremely harſh and odd, that, when teſtator has repeatedly required this act of aſſuming his name to be done by both father and ſon, if the father complies with the condition, and has a ſon, who lived but a day, and could not do an act of his own to ſignify his conſent, by force of the father's taking that name, this limitation veſts in the ſon, and he ſhall be preſumed to have done that act, and to have aſſumed that qualification: it is pretty ſtrong to ſay that. But this is a truſt eſtate; the fee veſted in the truſtees; and the limitation undoubtedly to the ſon is a contingent remainder, which is rightly admitted for defendant to be out of the power of the father tenant for life to deſtroy, becauſe the truſtees of the legal eſtate of inheritance will be ſufficient truſtees to ſupport all the contingent remainders in the will, as frequently determined, in *Penhay* v. *Hurrel*, and by me in *Hopkins* v. *Hopkins*, and ſo in other caſes. But though that is admitted, it is contended, this is a contingent remainder, that muſt neceſſarily veſt on birth of a ſon. Whether that be ſo or not, deſerves conſideration, and whether this is not as a condition ſubſequent; for it is a doubtful caſe, and to be conſidered every way. But there is another way, *viz.* as a qualification and deſcription of the perſon to take the contingent remainder; which if to be done by voluntary act of the ſon, how can this be made good? A contingent remainder muſt by law veſt during continuance of the particular eſtate, or *eo inſtante* that it determines; or elſe truſtees muſt be inſerted to ſuſtain that eſtate, till ſuch time as it ſhall veſt. When ſhall it veſt? On the birth of a ſon, or a ſon properly aſſuming that name? It was ſaid, that then the contingent remainder would be void; for it is commonly an eſtate *pour auter vie*, which determines by death of the father; and the conſequence was before the determination in *Reeve* v. *Long*, if the truſtees to preſerve, *&c.* went no farther, and the father died leaving a poſthumous ſon unborn, that ſon could not take; the eſtate to preſerve, *&c.* being gone by death of the father, and therefore the contingent remainder did not veſt during the continuance or *eo inſtante*, *&c.* The method therefore (as appears from *Bridgman*'s conveyances) taken by all artificial conveyancers was to carry the eſtate to preſerve, *&c.* farther than death of the father; limiting the eſtate to the father for life, remainder to truſtees and their heirs during his life to preſerve, *&c*; remainder to firſt and every other ſon; and then for default of ſuch iſſue, in caſe the wife ſhall happen to be *enſient* by the huſband at his deceaſe, to uſe of the wife till de-

Truſtees of the inheritance ſufficient to ſupport the contingent remainders.

Cited ante.

Contingent remainder muſt veſt during particular eſtate or *eo inſtante*; or elſe truſtees to ſuſtain.

Statute King *William* preſerves the eſtate to a *Poſthumous*'s child.

delivered of ſuch child, afterward to uſe of ſuch after born ſon, to preſerve the eſtate for nine or ten months: but ſince *Reeve* v. *Long*, which was in King *William*'s time, this is left out, being helped by the act of parliament then made. Might not then a ſettlement be made to the father for life (now ſuppoſe all the perſons in being) remainder to truſtees and their heirs during his life, and till a ſon ſhall be born lawfully begotten by him, who ſhall take the name, and from and after that time to that ſon? That would ſupport the contingent remainder till a ſon came in being, who by his own act ſhould take the name. This is indeed an uncertain time, and therefore liable to objection: but perhaps that may be the only way to come at it: for though uncertain, yet muſt it determine within the life of that ſon ſuppoſed to be born: and whether ſuch a limitation might not be made in a conveyance to comply with intent of teſtator, deſerves to be conſidered. In *Ray*. there was a term of fifteen years limited by teſtator himſelf; here by conſtruction ſome term might be fixed, at which his ſon might be ſuppoſed to attain years of diſcretion, and capable of determining whether he would take that name or not. I mention this method agreeable to that of conveyancers before *Reeve* v. *Long*; and give no opinion now.

For defendant. It is difficult to determine the year of diſcretion; for the law ſettles no time for it. How ſhall the court aſcertain the age of diſcretion of a particular perſon, to whoſe mind it is left, when he will do the act? It is a kind of uncertainty, that nothing in the method of conveyance will put it upon. The party to take is to have time during his life by the teſtator; then the court ought not to limit the time. If no perſon is to be conſidered as aſſuming the name to perform the condition, till he comes to the age of twenty-one, there will be in ſeveral caſes a reſulting; for being undiſpoſed of, he cannot take till that time. Beſide there is infinite difficulty; and it cannot be, what the teſtator meant; for if the elder ſon, or the firſt and ſecond, married, and died under twenty-one leaving children, the third ſon to the excluſion of the nephew would take the eſtate. Except in one caſe the court never keeps up a contingent intereſt by way of executory deviſe longer than a life in being or the nine or ten *months* before mentioned; *viz.* where portions for younger children; carrying it to the particular age of twenty-one in order to favour ſettlements of the family: but in no other inſtance. This would be a ſingular caſe: in *Scotch* intails there are ſeveral limitations of this ſort; and infants are conſidered immediately as taking.

LORD CHANCELLOR.

A contingent remainder may be put on any reaſonable contingency; then the court may create a truſt to ſupport it.

His Lordſhip took time to conſider.

On bill of revivor plaintiff cannot diſpute the decree, though defendant may.

Note: The cauſe came on 18 *June* 1748. on a bill of revivor by the preſent plaintiff to revive the former decree, and have the benefit thereof: whereupon *His Lordſhip* ſaid, they could not controvert the decree: that there have been caſes of bills in nature of revivor, to carry on a former decree, where the court ſometimes, though but ſeldom, have ſaid, the defendant may diſpute that decree, but never that the plaintiff might. The decree has determined the queſtion, whether it was then debated or not: and the court was thereby bound, though the plaintiff, being an infant, was not. The cauſe therefore ſtood over with liberty to plaintiff to bring an original bill, or take ſuch method to bring his right in queſtion, as he ſhould be adviſed.

Lord Chancellor ſent it afterward into *B. R.* and the certificate of the judges was, that "upon the true conſtruction of the will, *Hicks* "muſt by neceſſary implication to effectuate the manifeſt general "intent, be conſtrued to take an eſtate in tail male, he and the heirs "of his body taking the name of *Robinſon*, notwithſtanding the expreſs eſtate deviſed to him for his life and no longer": and the decree made thereupon by the Lords Commiſſioners 8 *March* 1757, was affirmed by the *Lords* 14 *February* 1758.

Caſe 68. Clark *verſus* Thorp, *March* 9, 1750-1.

LORD CHANCELLOR.

Waſte. A Guardian having converted the infant's antient paſture into plough-land, it is waſte; and this notwithſtanding the guardian ſaid, it was on account of the late contagious diſtemper among the cattle.

FH
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BRITANNICVM

Clavering

Clavering *verſus* Clavering, *March* 11, 1750-1.

Caſe 69.

SIR *John Strange* for *Lord Chancellor*.

On a bill to ſupply the loſs of a deed charged to be in defendant's hands, though a ſtrong caſe (as urged for plaintiff) for making an immediate decree, yet if defendants inſiſt on it, a trial muſt be directed; there being the ſame rule of evidence at law on loſs of a deed as in this court. Nor is it neceſſary to order, that the depoſitions of the witneſſes ſhould be read at law, for courts of law always read them.

Evidence. The ſame rule at law and in equity on loſs of a deed. Depoſitions read at law.

Theebridge *verſus* Kilburne, *March* 13, 1750-1.

Caſe 70.

WILLIAM SHARP by a voluntary deed veſted a term in truſtees out of the rents and profits of the eſtate to pay and diſcharge the reſerved rents, the ſurplus to himſelf for life; and from and after his deceaſe to pay his wife 10*l. per ann.* during her life, and the reſidue during life of his wife to his daughter *Sarah*: and after death of his wife the whole profits to *Sarah* during her life, and immediately from and after her deceaſe to the heirs of the body of *Sarah* lawfully to be begotten, if the term ſhould ſo long endure; for default of ſuch iſſue then to his grandaughter *Sarah Baily*, her executors, adminiſtrators, and aſſigns, if the term, *&c.*

Truſt term by voluntary deed to a daughter for life, and immediately after her deceaſe to heirs of her body; for default of ſuch iſſue, to a grandaughter her executers, &c. the daughter died without iſſue living, but had a child, who died young. The whole veſted in the daughter, or at leaſt in her child, and does not go over, as after a general dying without heirs of the body.

William and his wife both died: *Sarah* alſo, who married the defendant, died without iſſue living at time of her death: but the plaintiffs admitted to avoid further inquiry, that the defendant had by his wife a daughter born, who lived but about a year.

Sarah Baily having married the plaintiff, they brought this bill for an aſſignment and account of the rents and profits from death of defendant's wife.

For plaintiffs. The queſtion, whether this limitation over is void as too remote, has been often before the court. This is not a freehold, but chattel intereſt; not a legal limitation, but a declaration of truſt, which muſt be carried into execution by a further conveyance executed by the truſtees. Being a chattel, it is improperly limited by way of ſucceſſion; for ſuch an intereſt muſt go to executors, not to heirs of the body; who muſt conſequently take as purchaſers; but cannot by deſcent. Beſide it is to heirs of her body after her deceaſe; and who is heir of her body, cannot appear during her life. It is not to her children to be divided between

them, but to that perſon who ſhall be heir of her body. The whole queſtion then is, whether ſuch a conſtruction ſhall be put on it, as that it ſhall take effect? The ſettler of this eſtate was making a proviſion for his wife, daughter and grandaughter, and it ought to be ſupported ſo far as the words can be conſtrued. The abſolute intereſt did not veſt in defendant's wife, it being an expreſs ſtrict limitation for life to her. *Liſle* v. *Gray*, 2 *Jo.* 114, and *Archer's* caſe, 1 *Co.* 66. Then the heirs of her body are deſcribed as purchaſers; and this being in its nature not capable of a ſtrict intail, as an eſtate of inheritance is, makes it ſtronger. The court ſeldom allows an expreſs particular eſtate to be enlarged by implication: but whenever it is done, it is to continue the intereſt according to intent of teſtator, which would be otherwiſe defeated; as in *Langly* v. *Baldwin*, where other iſſue would be diſinherited: but is never done to defeat the intent, by putting the whole in the power of the perſon meant only to have an eſtate for life, and ſo defeat the heirs of the body. *Webb* v. *Webb*, 1 *Will.* 132; *Peacock* v. *Spooner*, 2 *Ver.* 43, 195; and *Daffern* v. *Goodman*, 2 *Ver.* 362. In *Price* v. *Price*, 2*d May* 1727, defendant on his marriage ſettled a leaſehold eſtate to truſtees to the ſole and ſeparate uſe of his intended wife for life for her jointure, and from and after her deceaſe to uſe of the heirs of the body of the wife by the huſband to be begotten, and for want of ſuch iſſue to uſe of the huſband and his heirs for ever. The wife died leaving only a ſon: the huſband took out adminiſtration to her, inſiſting the whole intereſt veſted in her: Sir *Joſeph Jekyll* held, the term veſted in the heirs of the body of the wife as purchaſers. It was a very hard caſe on the huſband, ſuch as the court would have determined for him if poſſible: yet held it ſo clearly ſettled, that it was ſo determined notwithſtanding: and though it was a caſe of marriage-articles, and the reſt caſes of deviſes, that made no material difference. Even courts of law have done this, and in reſpect of inheritances capable of a ſtrict limitation, and even on a deed; *Liſle* v. *Gray*. Next the limitation over is not too remote; for heirs of the body being deſigned to take as purchaſers, a particular perſon was deſigned to be deſcribed, then *for want of ſuch iſſue* muſt receive the ſame conſtruction as heirs of the body, and mean want of a ſon or daughter; which fact, how it will turn out, muſt be known at her death; ſo that the limitation over is to wait only during a life, and within all the rules of an executory deviſe waiting. This muſt be the conſtruction, if it had never come in queſtion before: but ſeveral determinations, carrying it farther than the preſent, make an end of it. *Withers* v. *Algood*, 4 *July* 1735. where plaintiff was held to take only eſtate for life, and great ſtreſs was laid on part being chattel intereſt. In *Sands* v. *Dixwell*, 8 *December* 1738. freehold and leaſehold were limited to truſtees for particular purpoſes: and the truſtees were afterward to convey part of the freehold to ſeparate uſe of the party's

Ante.
Cited in Bagſhaw v. Spencer, Novem. 1748.

ty's daughter for life, and after her deceaſe in truſt for the heirs of her body lawfully begotten: your *Lordſhip* over-ruled the point inſiſted upon in behalf of an eſtate tail in her on the limitation being applied to freehold and alſo to chattel intereſt, and determined, that her huſband, the defendant, was not intitled to be tenant by courteſy, and that ſhe had only an eſtate for life. In *Hodſel* v. *Buſſy*, 5 *December* 1740. a truſt term was limited by a deed very like this; your *Lordſhip* held the limitation over not too remote. In *Haver* v. *Dormer* 1711. a term for years veſted by Lord *Caernarvon* in truſtees for 45 years to commence from his own death in truſt after commencement of the term to pay 100*l. per ann.* rent, or ſo much as might be raiſed, to *William* ſon of *Charles Dormer* and his aſſigns, if the ſaid *William* ſhould be then living and of full age, whereby he might give a diſcharge: but if under age, then to be paid to his guardian: and if *William* ſhould happen to die without iſſue before the ſame became due and payable, or before the end and expiration of the term, then the ſame to be paid during reſidue of the term to *Robert* another ſon of *Charles* in the ſame way, if *Robert* was then living: if *Robert* ſhould dye, then over to the daughters of *Charles*. *William* came of age in life of *Charles*: a bill was brought by his creditors, inſiſting the whole intereſt was veſted in *William*, againſt the remainders over. Lord *Harcourt* ſent it into *C. B.* the opinion of the judges does not appear: but after it came back, he diſmiſſed the bill: which being on a deed ſeems a very ſtrong caſe. This is plainly therefore a proviſion for his daughter for life; if ſhe has a ſon or daughter living at her death, to that ſon or daughter; if none, then for the child of his other daughter, whom he deſcribes by name. *1. L. 2. Atk. 89.*

For defendant, who claimed the benefit of this term as adminiſtrator to his wife.

The grantor's meaning was to create an intereſt, that ſhould go in ſucceſſion to the heirs of the body; and when that ſucceſſion determined, or for want of ſuch iſſue, to the plaintiff; then the rule of law will operate upon that intent; for there cannot be raiſed by way of ſpringing uſe, ſpringing truſt, or executory deviſe, ſuch a limitation to depend on the future contingency of failure of that ſucceſſion. The common known meaning of *heirs of the body* is not merely a ſingle perſon, but a ſucceſſion of ſuch, *viz.* children and their children as long as there ſhould be any. They are the preciſe technical words to make an eſtate tail; for in a deed no other words will do. The adding *to be begotten* alſo carries on the ſucceſſion: and Lord *Hale* in *King* v. *Melling* laid a ſtreſs on words of that kind, as having an eye of an eſtate tail. Then why ſhould not he in making a will or ſettlement mean this, which he would mean in common converſation? In *Butterfield* v. *Butterfield*, Ante.

12 *November* 1748. your *Lordſhip* held the limitation over void as too remote, and that it was an abſolute veſted intereſt in the firſt taker.

LORD CHANCELLOR.

Expreſs eſtate limitation not enlarged by implication.

I am of opinion, that according to this limitation the whole truſt of the term did veſt in *Sarah Sharp:* but if that was not ſo, or if that was doubtful, it would veſt in her daughter though dying in her life, and conſequently could never go over to plaintiff by virtue of the laſt limitation.

As to the firſt point it is ſaid in ſupport of it, here is an expreſs eſtate for life given, which ſhall not be enlarged by implication. That is true to a certain degree; and the court will not make or ſtrain an implication to extinguiſh or enlarge the eſtate for life. But this is ſuch a limitation, as does not come up to that implication; for in all thoſe caſes where that doctrine is laid down, ſtill it has been held, that if there is an eſtate for life, remainder to heirs of the body of the party, that is not an enlargement by implication, but the law unites both; as in *Popham* v. *Bamfield*; if therefore this had been a limitation of freehold eſtate, it had undoubtedly been an eſtate tail in *Sarah Sharp*. But though that would have been ſo, it is ſaid, the conſtructoin of the truſt of a term is different; becauſe the conſtruction is to be made, as far as the rules of law will admit, to ſupport the limitation, and not to deſtroy it, as this conſtruction would do. Undoubtedly there have been caſes, which have gone a good way for that: but none of them come up to the preſent, which is the common caſe of the limitation of the truſt of a term after a general dying without heirs of the body, and nothing to diſtinguiſh it. But caſes have been cited to make the dying without iſſue to be within ſome certain, limited, reaſonable compaſs of time; as in *Haver* v. *Dormer*; in which I take it for granted, Lord *Harcourt* went according to the opinion of the judges. It was not too remote, becauſe it was to veſt in *Robert*, only if he was living at death of *William* without iſſue; which would be in a freehold eſtate an executory deviſe, and a plain reſtriction of time which the law allows. Here is nothing of that unleſs from the word *immediately*. Now to lay ſuch a ſtreſs on that as to make it heirs of the body living at time of her death would be to make theſe limitations very precarious from uncertain words, thrown in by the drawer of the conveyance, there being no difference in ſaying immediately after, or from and after, her deceaſe. As to *Hodſel* v. *Buſſy* it was a very particular caſe: the limitation there was firſt to *Grace* wife to *Edmund Buſſy* for and during 59 years, if ſhe ſhould ſo long live; and after her deceaſe to the uſe of *Edmund* during life; and after both their deceaſes in truſt for the heirs of the body

body of *Grace* by *Edmund*, and to their executors, adminiſtrators and aſſigns during the term; and for want of ſuch iſſue to *Henry Halſey*; *Edmund* died without iſſue by his wife, who ſurvived; on a bill by the wife the queſtion was, whether the laſt limitation was too remote? The court held, it was not: but the governing reaſon was, that the limitation was to the heirs of the body, their executors adminiſtrators, and aſſigns: which words differed it from *Stanley* v. *Lee*, and *Clare* v. *Clare* and all the other caſes, and made that a plain caſe, becauſe there was no eye of an eſtate tail, as Lord *Hale* ſays: for it could not go from one heir of the body and his executors and adminiſtrators to another heir of the body and his executors and adminiſtrators, and therefore muſt veſt in the firſt perſon taking, and his executors and adminiſtrators: the ſame as if it had been ſaid; I give it after both their deceaſes in truſt for the eldeſt ſon begotten; if no ſon, then to a daughter, their executors, adminiſtrators, and aſſigns. In *Withers* v. *Algood* there was a very particular reaſon attending, *viz.* words of limitation ſuperadded to the words of limitation. It was alſo limited to the heirs of the body of three ſtrangers, who muſt take as purchaſers; for their anceſtors took nothing; which made it a ſtrong caſe for that; and therefore Lord *Talbot*, putting them all together, made them all take as purchaſers; and the only uſe made of that caſe in *Bagſhaw* v. *Spencer* was to ſhew, that, where a plain intent of teſtator was expreſſed to make heirs of the body take as purchaſers, notwithſtanding the rule of law which makes them words of limitation, they may be conſtrued as words of purchaſe. *Price* v. *Price* was on marriage; on which there could be no doubt, if it had been freehold eſtate, but the court would conſtrue heirs of the body to be firſt and every other ſon. As to the older caſes, *Peacock* v. *Spooner* was laid weight upon; and indeed if that is taken to be an authority throughout, it is a very ſtrong one. I have a copy of the minutes of the opinions of the judges in the *Houſe of Lords*, which were ſix againſt two; *viz.* *Atkins*, *Gregory*, (who reported the opinion of *Holt C. J.*) *Rokeby*, *Powel*, and *Turton*, for the decree of Lord *Jefferies*; and *Nevil* and *Lechmere* for that of the Lords commiſſioners; ſo that it was a judgment contrary to the opinion of a great majority of the judges; which plainly accounts for the doubt always expreſſed on the mention of that caſe, and why the court reſorts to another reaſon. It was beſide a caſe on marriage-ſettlement of a term. Then *Webb* v. *Webb* is a ſtrong authority againſt the plaintiff for the opinion I now mention; and that was on a marriage. In *Stanley* v. *Lee*, the limitation was very different; and the queſtion there was on the double contingency, whether that could be admitted or not.

2 Wil. 686. Tal. 21.

As to the other queſtion, ſuppoſing it would not veſt abſolutely in *Sarah Sharp*, I am of opinion, it would in the heirs of her body; and ſhe having a child, it would be the ſame thing as to the plaintiff,

it will be the ſame, as if it had been to the iſſue of her body; in which caſe, if there was ſufficient ground to conſtrue them words of purchaſe, it would veſt in that iſſue as ſoon as born, and the ſame as if to her children. And in thoſe caſes, when the words *heirs of the body* are conſtrued to be words of purchaſe in the ſame ſenſe as *iſſue*, it was never held neceſſary, that the iſſue ſhould ſurvive the firſt taker ſo as to be ſuch perſon, as in ſtrictneſs ſhould be heir; for it is not like a limitation to the heir of the body in the ſingular number, which would be ſuch a deſcription as to ſhew, that ſuch perſon, as was ſtrictly heir, ſhould take. That is not the conſtruction: but *heirs of the body*, when conſtrued words of purchaſe in ſuch a limitation, have been conſtrued in the ſenſe of *iſſue*; and whenever born, it veſted. There is great reaſon in it; for if the daughter had lived and married, there is no reaſon to ſay, that daughter ſhould not be advanced by this in life of her mother, unleſs there is ſomething to reſtrain it to heirs of the body at time of her death; which there is not here, unleſs the word immediately be ſo taken, which is only the ſame as from and after her deceaſe.

Plaintiff therefore is not intitled; and the bill muſt be diſmiſſed, but without coſts.

Caſe 73. Methwold *verſus* Walbank, *March* 13, 1750-1.

Agreement to aſſign fees of gaoler, and profits of tap-houſe: not carried into execution.

BILL to carry into execution an agreement for aſſignment of the fees and profits of the office of keeping *Bridewell*, and of the profits of the tap-houſe.

LORD CHANCELLOR.

The keeper of an houſe of correction I will never ſuffer to aſſign over the profits and fees of his office; for it muſt plainly tend to oppreſſion and extortion, and ſhould not receive countenance. It is contrary to the plain intent of the ſtatute 23 *H.* 6. *cap.* 10. commonly called the ſtatute of eaſe and favour. I will never carry ſuch an agreement into execution in a court of equity; for though the word *ſheriff* is mentioned there, it meant to provide againſt all theſe miſchiefs, and extends to all.

As to the latter part of the caſe alſo, I will never allow it; for it tends to increaſe riot and debauchery among the priſoners.

Diſmiſs the bill therefore.

Tickel

Tickel *verſus* Short, *March* 14, 1750. Caſe 74.

LORD CHANCELLOR.

The rule of equity is, that if an order is ſent by a principal to a factor to make an inſurance; and he charges his principal, as if it was made; if he never in fact has made that inſurance, he is conſidered as the inſurer himſelf. In a tranſaction between merchants in different countries one ſends to the other to inſure, who pretends to do it, and charges his correſpondent as if done; he ſhall, after a loſs happens, be charged as the inſurer: that is a right principle; but if ſuch factor employs an agent, that equity will not extend over to that agent.

Factor or correſpondent pretending to inſure as directed, charged as inſurer; not ſo of an agent employed by him.

If one merchant ſends an account current to another in a different country, on which a balance is made due to himſelf; the other keeps it by him about two years without objection: the rule of this court and of merchants is, that it is conſidered as a ſtated account.

Account current kept two years: ſtated

Denton *verſus* Shellard, *March* 16, 1750-1. Caſe 75.

THE decree having directed an account to be taken of a ſum of money, which by marriage-articles was to be laid out in purchaſe of land, part for a jointure, directed, that it ſhould anſwer intereſt without ſaying at what rate. The maſter computed it at five *per cent.*

Intereſt if generally decreed, conſtrued legal: but ſtill by the nature of the fund, and if out of land or money, conſidered as lands reduced to 4 per cent.

Exception to the report, for this being to be conſidered as land, the rate ought to be no higher, than is uſually charged on land, *viz.* four *per cent.*

Againſt which it was ſaid, the computation has been made in the uſual way upon a general direction of intereſt. The court in many caſes gives five, and that is the rule generally, where a legacy is payable out of perſonal eſtate, unleſs on circumſtances. Nothing ariſes from the nature of the fund; for this muſt be conſidered as perſonal; as ſuch the account is directed to be taken. If every ſmall circumſtance will take it out of the general rule, it will reduce the rule to nothing: the decree was by the late *Maſter of the Rolls*, and has given intereſt; and the conſtant practice at the *Rolls* during his time was, that that meant legal intereſt. This was in 1746, when intereſt was very high; all which might have influenced him to direct in this manner; and it is the ſame, as if he had directed it at five.

LORD

LORD CHANCELLOR.

It is certainly a hardſhip, where intereſt is not particularly directed to be five, to decree five; but ſometimes the court cannot avoid it, though deſirable to come at it, as where it is on perſonal ſecurity: but the court always lays hold of a circumſtance to reduce things to a reaſonable rate, and according to what the fund will produce. What is the circumſtance here? Where a decree directs intereſts generally, it is to be ſure commonly conſtrued legal intereſt; the Maſters therefore are not to blame to follow that rule: but ſtill that muſt be conſtrued by the nature of the fund. If this then was a legacy out of land, though intereſt is given generally, there would be no doubt, but the maſter, when it came before him, ſhould conſider it *ſecundum ſubjectam materiam*; and it is ſtill open to do ſo on exception to the report, and to judge that the decree meant ſuch intereſt, as the court gives, when money is charged on land. This is not directly that caſe, but a middle caſe. The fund is ſtrictly perſonal; yet it retains the nature of land ſtill: and if the court conſiders it as land to any purpoſe, it ought to do ſo to reduce it to four. Therefore allow the exception.

Caſe 76. Jones *verſus* Lewis, *March* 18, 1750-1.

A Decree had been againſt defendant's husband (to whom ſhe was adminiſtratrix) for a general account of aſſets, and for payment of the balance.

Defendant, decreed to account for aſſets, delivers goods to a ſolicitor, who is robbed: defendant not to be charged.

Exception by defendant to the report; for that certain goods, which had been delivered by her to her ſolicitor, and offered to plaintiff had been ſince ſtolen from her ſolicitor; for which ſhe therefore was not accountable; that they came into his hands in nature of a truſtee, who kept them as his own, and was robbed thereof, and ſhould not be reſponſible. *Coggs* v. *Bernard*, Lord *Ray.* 909. *Morely* v. *Morely*, 2 *C. C.* 2. and the doctrine in *Southcot*'s caſe, 4 *Co.* 83. long looked on not to be law.

Bailee, truſtee, &c. keeping as their own diſcharged.

E con. Plaintiff is not anſwerable for any loſs by means of defendant's negligence; for ſhe delivering the goods to her ſolicitor was a voluntary act, which ſhe had no occaſion to do, but ſhould have kept them in her own hands. Though perſons come by right of executorſhip or repreſentation to the poſſeſſion of goods, they are not impowered to intruſt them to another: nor ought ſhe to have detained them after the decree, which had determined the right; they are kept therefore at her peril.

LORD CHANCELLOR.

I will now conſider this caſe, as if the robbery had been without any tender of the goods at all to the plaintiff. It is certain, that if bailee of goods, againſt whom there is an action of account at law, loſes the goods by robbery, that is a diſcharge in an action of account at law: and it is proved, (and, I think, reaſonably) that if a truſtee is robbed, that robbery properly proved ſhall be a diſcharge, provided he keeps them ſo, as he would keep his own. So it is as to an executor or adminiſtrator, who is not to be charged further than goods come to his hands; and for theſe not to be charged, unleſs guilty of a *devaſtavit*; and if robbed, and he could not avoid it, he is not to be charged, at leaſt in this court. How it would be at law, I know not; for I know no caſe of that at law. The defendant is adminiſtratrix: ſuppoſing theſe goods had been in her own cuſtody, and ſhe had been robbed, I am clear of opinion, if that fact be made out, (which can only be by circumſtances, as it is probably made out here) ſhe ought to have been diſcharged of theſe goods; and that notwithſtanding no tender thereof; for that was a ſuperabundant act; for it is a decree againſt her husband not for delivery of the goods, but for a general account of aſſets, and nothing directed to be paid but what was found on the balance. The only doubt then is, that they were not loſt out of her cuſtody, but her ſolicitor's, where they were put by her for a particular purpoſe. I do not know, that a bailee, executor, adminiſtrator, or truſtee, are bound to keep goods always in their own hands. They are to keep them as their own, and take the ſame care; if therefore a man lodged truſt money with a banker, if loſt, in many caſes the court has diſcharged the truſtee, eſpecially if loſt out of the banker's hands by robbery. In the preſent caſe what has been done, is, what ſhe would have done with her own; leaving them with her ſolicitor in order to be delivered to plaintiff when proper ſo to do; and why might ſhe not do that? It is the ſame, as if they had been in her own cuſtody; and there is no pretence that they were colluſively put into the hands of her ſolicitor. It would be too hard to charge her with theſe things loſt; this exception therefore muſt be allowed.

Kirby *verſus* Clayton, *March* 23, 1750-1. Caſe 77.

Petition by a Remainder of money, on which a contingent, though not probable, intereſt might ariſe, to have it paid; not granted.

A Sum of money being given in truſt for the child of *Archibald Cunningham*, if he left any at time of his death, remainder over to a young Lady, who married *Kirby*, with power to the truſtees to apply the produce for advancement, maintenance, education, and preferment; *Cunningham* being near ſixty, and his wife a little above forty, but having no child at preſent, a petition was preferred on part of

of *Kirby* and his wife as the only perſon now in *eſſe* intitled, and no great probability of any other coming in *eſſe*, to have all the remaining and growing produce applied for the petitioner.

On a former application the court gave 1000 *l.* out of the produce: there had been then an affidavit by *Cunningham* and his wife, that they believed, the wife was then with child, which ſince proved otherwiſe; and therefore the preſent petition ſeemed to be made.

LORD CHANCELLOR.

This is a moſt extraordinary application, it is aſking the court to do that, which can be only done by the legiſlature; and which, if an application was made to the legiſlature for a private act of parliament, they would not and ought not to do under the circumſtances; for it is aſking to diſpoſe of an eſtate, on which a contingent intereſt may ariſe on no remote poſſibility to a perſon, who, if he comes in *eſſe*, will be intitled to the whole. How then can the court give the accumulated produce to a ſubſequent remainder, when there is ſuch an intereſt capable of ariſing, and which, I cannot preſume, is not likely to happen, as he may have children by this wife or by another, for ought that appears? It reſts then on the truſtees power devolved on the court. The court has thought fit formerly to give a conſiderable ſum, eſpecially as no ſettlement; then it is not reaſonable to go much farther, and impoſſible to do what is aſked. But as there is no great probability of a perſon's coming in *eſſe*, the court would aſſiſt them as much as poſſible; and may perhaps under the general head of maintenance order ſome certain annual ſum to be paid to her ſeparate uſe not beyond 50 *l. per ann.* but cannot go further.

This was not oppoſed; and directed till further order.

Caſe 78. Fuller *verſus* Hooper, *March* 23, 1750-1.

PETITION to vary minutes of decree.

LORD CHANCELLOR.

A will conſidered as to the teſtament, conſiſting of all the parts including codicil; and as to the inſtrument, the writing.

A will is to be conſidered in two lights, as to the teſtament and the inſtrument. The teſtament is the reſult and effect in point of law, of what is the will; and that conſiſts of all the parts; and a codicil is then a part of the will, all making but one teſtament: but it may be made at different times and different circumſtances, and therefore there may be a different intention at making one and the other. The inſtrument is that writing, in which the will is contained:

tained: the teſtatrix here meant to refer to the inſtrument, not to the teſtament which takes in all the parts. Suppoſe ſhe had by her will given 50 *l.* to all her nephews except thoſe after mentioned: and at conſiderable diſtance of time after increaſe of fortune and alteration in her family, makes a codicil, and thereby gives a legacy to one of the nephews: ſhould that exclude from the 50 *l.* when probably it was meant additionally, as a codicil commonly is? That would be for me to exclude by conjecture.

Brownſword *verſus* Edwards, *March* 20, 1750-1. Caſe 79.

FRANCIS BROWNSWORD deviſed the premiſes to two perſons and their heirs to receive the rents and profits, until that little boy, commonly called *John Bownſword*, ſhould attain twenty-one, which would be 14 *Octr.* 1746, in truſt in the mean time and from time to time to place the ſame out at intereſt for the improvement of the eſtate; and if he ſhould live to attain the ſaid age of twenty-one, or have iſſue, then to the ſaid *John Brownſword* and the heirs of his body: but if the ſaid *John Brownſword* ſhould happen to die before the age of twenty-one, and without iſſue, then in the ſame manner he deviſed it to the ſame perſons in truſt, till that little girl, commonly called *Sarah Brownſword*, ſhould attain the age of twenty-one, which would be at ſuch a time: but if ſhe ſhould happen to die, *&c.* exactly in the ſame words as the former deviſe, then to the other collateral branches of his family: and for want of ſuch iſſue to his own right heirs for ever.

Plea and demurrer.

Plea to diſcovery of marriage, as it would ſubject to puniſhment for inceſt in eccleſiaſtical court, though one party dead; allowed.

John Brownſword attained twenty-one, and died without iſſue, having deviſed all his eſtate real and perſonal to his wife the preſent plaintiff, who charged in her bill, that the ſon deſcribed in the will was the legitimate ſon of the teſtator by the defendant *Anne Edwards*; on which the relief was prayed, that the ſaid defendant might diſcover, whether ſhe was lawfully married to teſtator, at what time, in whoſe preſence, and where, and whether ſhe had not iſſue thereby.

Deviſe to truſtees in fee, if B. attains twenty-one or has iſſue, to B. and heirs of his body; but if B. dies before twenty-one and without iſſue, over: B. attains twenty one, and dies without iſſue: an eſtate T. veſted in B. at twenty-one or on having iſſue, and the limitation over a remainder, which takes place on failure of iſſue of B.

To this diſcovery *Anne Edwards* put in a plea, that ſhe was not bound to anſwer on this ground; ſhe averred by her plea, that teſtator was before married to her own ſiſter, by whom he had children, who ſurvived him; and conſequently, if ſhe was married to him afterward, it would be an inceſtuous marriage contrary to law, and ſubject her to the penalties and puniſhments, the law inflicts on ſuch a crime.

It was argued, that this plea muſt be taken to be true, this being a criminal matter; for ever ſince the St. *H.* 8. one cannot legally marry his wife's ſiſter after death of his firſt wife; then ſhe would be

be liable to proſecution in eccleſiaſtical court for inceſt, which is of eccleſiaſtical conuſance. It is as much a crime as any made ſo by the common law; and that it is a grievous one, appears indiſputably from one of the canon laws inflicting a penance, which in the eye of the law is looked on as a corporal puniſhment; and, when ſued in eccleſiaſtical court, her anſwer in this court confeſſing it, would convict her. That ſhe would be liable, *Hicks* v. *Harris*, *Carth.* 271, 2 *Sal.* 548, 4 *Mod.* 182. nor is a ſuit of that kind in eccleſiaſtical court put an end to by any ſtatute of limitations or death of either party.

Againſt the plea. Plaintiff's right is founded on the fact of legitimacy of her huſband, that there was a lawful marriage between teſtator and defendant; and every court leans in favour of legitimacy. Defendants may in many inſtances protect themſelves againſt making diſcoveries attended with penal conſequences: but it muſt be ſhewn, that that will neceſſarily follow: which does not appear in this caſe: for this is not a natural inceſt, ſuch as forbid by the laws of nature, but only *malum prohibitum*, put an end to by death of either party, after which a ſuit cannot be inſtituted in eccleſiaſtical court for the puniſhment. Nor does the caſe cited determine, that the party is ſubject to eccleſiaſtical cenſure; only determining that it is a matter proper for their juriſdiction. On a bill ſuggeſting the wilful loſs of a ſhip for that the party had inſured to twenty times the value, though that is made felony by the ſtatute, yet where defendant is required to ſet forth, what inſurances he made on the ſhip, he is never allowed to protect himſelf againſt that; of which there are ſeveral inſtances. In *Wilſon* v. *Prince*, *Paſ.* 1740. a bill was for the earnings of a ſhip in the *Eaſt India company's ſervice*, which ſhe might have made, if ſhe had performed her voyage, charging that defendant had inſured ſo largely, that it was his intereſt to loſe the ſhip, and requiring account of what ſums were taken up; defendant pleaded, that having taken up 3000 *l.* of the company, and taken an oath to trade for no more, if it appeared, he had, he might be liable to indictment for perjury, and his anſwer read in evidence againſt him: the plea was over-ruled. If this plea ſhould turn out falſe in fact, though in general caſes there would be a judgment in chief againſt the falſe pleader, yet in this the court could not give that judgment: ſo that this would anſwer defendant's purpoſe as well, as if it was ever ſo fair, and the court cannot then do right to the plaintiff. It might perhaps ſubject defendant to a ſmall penance: whereas, preventing legitimacy, it is of great conſequence on the other ſide.

LORD CHANCELLOR.

This appears a very plain caſe, in which defendant may protect herſelf from making a diſcovery of her marriage; and I am afraid, if

if the court ſhould over-rule ſuch a plea, it would be ſetting up the oath *ex officio*; which then the parliament in the time of *Charles* I. would in vain have taken away, if the party might come into this court for it. The general rule is, that no one is bound to anſwer ſo as to ſubject himſelf to puniſhment, whether that puniſhment ariſes by the eccleſiaſtical law or the law of the land. Inceſt is undoubtedly puniſhable in eccleſiaſtical court; and ſuch a crime is generally excepted out of the acts of pardon. The eccleſiaſtical court has conuſance of inceſt in two reſpects, *diverſo intuitu:* firſt to judge of the legality of the marriage, and to pronounce ſentence of nullity; and if they do ſo, proceeding lawfully and rightfully, it binds all parties, being the judgment of a court having proper juriſdiction of the cauſe. The other is to cenſure and puniſh perſons guilty by eccleſiaſtical cenſure, as for fornication, adultery, *&c.* Nor is it material, what the nature of the puniſhment is. It is a puniſhment, which muſt be performed, or got rid of by commutation, which is like a fine. Then conſider the preſent caſe. The diſcovery whether lawfully married takes in the whole, whether married in fact, and whether that marriage was lawful. Defendant has pleaded to it; which ſhe may do; and in the plea it is proper to bring in facts and averments to ſupport that plea: whereas a demurrer can be to nothing, but what appears on the face of the bill, otherwiſe it would be a ſpeaking demurrer. But here it was neceſſary to bring in ſuch an averment, that teſtator was lawfully married before to her ſiſter, and had iſſue; which is a fact neceſſary to ſhew; and that fact ſhe has taken on herſelf to prove: the plea therefore is regular in form, and good in ſubſtance. The objection to the plea is, that one of the parties to the inceſtuous marriage being dead, there can be no proceeding afterward. I always took the diſtinction to be, what is laid down in *Hicks* v. *Harris*, that by the law of the land the eccleſiaſtical court cannot proceed to judge of the marriage and to pronounce ſentence of nullity after death of one of the married parties, eſpecially where there is iſſue, becauſe it tends to baſtardiſe the iſſue; and none after death of one of the parties to that marriage, is to be baſtardiſed: but there is no rule of law ſtanding to prevent either of the parties from puniſhment after death of the other. Suppoſe it was an offence of adultery or fornication, there is no rule of the civil or eccleſiaſtical law, that after death of one of the parties the ſurvivor may not be puniſhed for the offence: undoubtedly they may, either by proceeding *ex officio*, by office of the eccleſiaſtical judge, or by promotion of a proper informant. Then why may not the eccleſiaſtical court do it in the caſe of inceſt, whether without the formality of marriage or attended with it? But it is ſaid, *Hicks* v. *Harris* is no judicial determination in the point, and that all, that was material before the court, was the point of juriſdiction; which is true: but there was a plain difference. If the court had held, that the proceeding (and this is an anſwer

None bound to anſwer ſo as to ſubject to puniſhment.

Inceſt conuſable in eccleſiaſtical court as to legality of marriage and puniſhment.

Averments proper to ſupport a plea.

Demurrer only to what on face of the bill: elſe a ſpeaking demurrer.

Eccleſiaſtical court cannot annul marriage after death of one party, as it baſtardiſes the iſſue: but may puniſh the other for inceſt or fornication.

Sentence in eccleſiaſtical court for fornication, &c. in a criminal no colluſion.

way, not evidence againſt the iſſue; otherwiſe if on the point of the marriage, and

anſwer to one part of the objection) even for the cenſure againſt the ſurviving party would have tended to affect the legitimacy of the marriage or the iſſue, the court of *B. R.* would have ſtopped there: but they went on this, that it could not be given in evidence againſt the iſſue or the plaintiff claiming under that iſſue: as was determined ſolemnly in *B. R.* on a long trial at bar, directed out of this court in *Hillyard* v. *Grantham*, in which I was of counſel. In that cauſe during life of the father and mother there had been a proceeding againſt both of them in the conſiſtory-court of *Lincoln* for living together in fornication, and ſentence given againſt them. On the trial that ſentence was offered in evidence to prove, that they were not married: the whole court were of opinion, that it could not be given in evidence; becauſe firſt it was a criminal matter, and could not be given in evidence in a civil cauſe; next that it was *res inter alios acta*, and could not affect the iſſue: but they held that if it had been a ſentence on the point of the marriage on a queſtion of the lawfulneſs of the marriage, it, being a ſentence of a court having proper juriſdiction, might have been given in evidence. If indeed there had been colluſion, that might be ſhewn on the part of the child to take off the force of it; becauſe colluſion affects every thing: but if no colluſion, it binds all the world: but in a proceeding in a criminal way that could not be given in evidence; and that was the diſtinction, the court went on in *Hicks* v. *Harris*. But if there had not been that authority, I ſhould not have doubted on the nature of the thing, but that the eccleſiaſtical court might have proceeded after death of one party as well for inceſt as fornication; in which caſe, there is no doubt, they may. Thus far as to the merits of the plea. Some collateral arguments have been uſed, that it is not in every caſe, the party ſhall protect himſelf againſt relief in this court upon an allegation, that it will ſubject him to a ſuppoſed crime.

Uſury, forgery. Though court will not compel a diſcovery, it will not create a defence, but direct a trial.

It is true, it never creates a defence againſt relief in this court; therefore in caſe of uſury or forgery, if proof can be made of it, the court will let the cauſe go on ſtill to a hearing, but will not force the party by his own oath to ſubject himſelf to puniſhment for it. In a bill to inquire into the reality of deeds on ſuggeſtion of forgery, the court has entertained juriſdiction of the cauſe; though it does not oblige the party to a diſcovery, but directs an iſſue to try whether forged. I remember a caſe, where there was a deed of rent charge ſuggeſted to be forged: it was tried twice at law, and found for the deed; a bill was afterward brought to ſet it aſide for forgery, and to have it delivered up to be cancelled. Lord *King* notwithſtanding the two trials, which had been in *Avowry* and *Replevin*, directed an iſſue; whereon it was found forged, and, I remember, was cancelled and cut to pieces in court. There are ſeveral inſtances of that: ſo that the relief, the party may have, is no objection. As to the objection from the conſequence of allowing this plea if the defendant ſhould fail in the proof of it, that would be an objection to the allowing any

plea

plea to a diſcovery: though it would be no objection to a demurrer, becauſe that muſt abide by the bill: but all pleas muſt ſuggeſt a fact: it muſt go to a hearing; and if the party does not prove that fact, which is neceſſary to ſupport the plea, the plaintiff is not to loſe the benefit of his diſcovery: but the court may direct an examination on interrogatories in order to ſupply that. The plea therefore ought to be allowed.

Demurrer muſt abide by the bill.

Pleas ſuggeſt a fact, to be proved.

Next *as to the demurrer of Sarah Brownſword* for that plaintiff had not made out a title, the defendant's remainder being veſted, and her claim was on failure of that eſtate tail in *John Brownſword*.

For plaintiff. Theſe limitations muſt be taken to be executory deviſes, ſuch as reſted in ſuſpenſe and contingency; and on the events, which happened, the ſubſequent limitations could never ariſe; for both events muſt firſt happen; *viz.* *John* muſt dye before twenty-one without iſſue: whereas he attained twenty-one. Nor is there ſufficient to warrant the turning this executory deviſe into a remainder. The teſtator meant to create a temporary truſt to have continuance, till *John* came of age, and then that it ſhould veſt abſolutely in him; or if he died before twenty-one leaving iſſue, then it ſhould go to that iſſue; ſo that it is to be taken diſtributively. That this conſtruction has been made in ſimilar caſes, *viz.* that both events of dying without iſſue and before twenty-one muſt happen, before the contingent deviſe over takes place, ſee *Eq. Ab.* 188, and 1 *Sid.* 148. In any other conſtruction the teſtator has omitted (what he never could intend to do) the providing for the event of *John*'s dying under age leaving iſſue.

LORD CHANCELLOR.

As this is a queſtion upon the legal title to an eſtate on the conſtruction of a will, if there was any doubt, I ſhould not determine it on demurrer; but would, notwithſtanding the inclination of my opinion might be in favour of defendant, overrule the demurrer without prejudice to defendant's inſiſting on the ſame matters by way of anſwer; ſo that it might more fully come before the court at the hearing: this the court ſometimes does on the conſtruction of wills. But if the opinion of the court is, that as on the face of the bill plaintiff has no title, and the will is ſet forth *verbatim* in the bill; it is juſt, andmore for the benefit of the parties, to cut it ſhort on the demurrer; ſince it muſt be ſtill determined juſt on the ſame matters, as are before the court on the demurrer. In theſe caſes of wills the governing rule

On conſtruction of a will demurrer overruled without prejudice: unleſs on face of bill no title in plaintiff; demurrer allowed.

Intent of teſtator the rule of conſtruction: if the words can be complied with.

rule of conſtruction is the intent of teſtator; which the court is to find out by his words, and to conſtrue conformable thereto, ſo far as it is poſſible conſiſtent with the rules of law. The intent here was plain: here were two children, teſtator conſidered as his own: whether legitimate or not, I enter not into the queſtion. On this demurrer I muſt take them to be legitimate. He had a mind to make a proviſion for them; and the material point is, that it is a limitation to them in tail; and if their iſſue failed, he intended plainly to give it over to the other collateral branches of his family, and for want of ſuch iſſue to his own right heirs for ever. The queſtion is, whether I can by conſtruction, or on the ſtrict literal meaning of the words, let in the right heirs of teſtator ſo as to defeat all the ſubſequent limitations? This would be plainly contrary to his intent: but if the force of the words is ſuch, as that the intent cannot be complied with, the rule of law muſt take place. It is ſaid, he has given nothing over but on the contingency of *John*'s dying without iſſue under age. Conſider, what neceſſity there is from the words to conſtrue it in that manner, which would be to defeat his intent. Having firſt given the whole legal fee to truſtees and their heirs, he did not intend, either of theſe two children ſhould have any thing veſted till twenty-one or the having iſſue, and then to have an eſtate tail; conſequently as ſoon as *John* attained twenty-one, or had iſſue, though he died before twenty-one, that defeated and determined the eſtate in law given to the truſtees, and veſted a fee tail in him. He did attain twenty-one, and therefore had an intail; as he would, if he died before twenty-one, but had iſſue. Then the conſtruction could not be, as inſiſted for plaintiff, as with a double aſpect; if he attained twenty-one then to veſt in him an eſtate; or if he died before, leaving iſſue, then to give it to that iſſue: that is not the conſtruction of the will: but it is to give an eſtate tail in either event: ſo that ſuch iſſue would take as heir of the body of his father an eſtate tail from him, in whom in point of law it veſted, which eſtate would defeat the fee in the truſtees. Then as to the ſubſequent words if the court is compelled to make the conſtruction, the plaintiff inſiſts on, the court will do it: but however in the conſtruction of wills the court has conſtrued the words conformably to the intent of teſtator as much as poſſible, ranging in a different order and tranſpoſing them to comply therewith. There is no neceſſity to do either in this caſe, or to ſupply material words: but there is a plain, natural, conſtruction upon theſe words, *viz.* if the ſaid *John* ſhall happen to dye before twenty-one, and alſo ſhall happen to dye without iſſue: which conſtruction plainly makes the dying without iſſue to go through the whole, and fully anſwers the intent, which was in that manner. Had the firſt deviſe been to

Words tranſpoſed or ſupplied by court to comply with intent.

John and his heirs, this conſtruction, I believe, could not be made; for where there is ſuch a contingent limitation, I do not know, that the court has changed *heirs* into *heirs of the body* to make it ſo throughout. But much ſtronger conſtructions have been made than this in deviſes; *Cr. C.* 185, and other caſes in *Croke*; as in deviſe to one and his heirs, and if he ſhall dye before twenty-one or without iſſue then over, the court has ſaid, it was not the intent to diſinherit the iſſue, and therefore *or* ſhould be conſtrued *and*: but if the firſt limitation had been in tail, there would be no occaſion to reſort to that, but the court would have made the conſtruction, I do now; *viz.* if he dies without iſſue before twenty-one then over by way of executory deviſe; if he dies without iſſue after twenty-one, when the eſtate had veſted in him, it would go by way of remainder; becauſe he had made his original deviſe capable of a proper remainder; in which caſe the court will always conſtrue it a remainder. An eſtate tail is capable of a remainder, and it is natural to expect a remainder after it. It is contrary to his intent to let in this remainder to the right heirs to defeat all the intermediate limitations to his family. This is the intent of teſtator, and well warranted by an eaſy conſtruction of the words of the will. The demurrer therefore muſt be allowed.

1 Ld. Ray. 645. 2. Stra. 1175. 1. Wils. 140. 3. Atk. 390. 7. Durnf. & East 170.

Ex Parte Williamſon, *March* 25, 1751. Caſe 80.

PETITION that the court might diſallow the certificate of the bankrupt *Williamſon* formerly a merchant in *Corke*, having purchaſed ſeveral ſhares of the ſeamen who had taken the rich prizes of *The Marquis D'Antin* and *Lewis Eraſme*, and having aſſigned the ſame over to Mr. *Mackey* his correſpondent in *London*, as a ſecurity for what he owed *Mackey*, who had principally taken out the commiſſion againſt him; which the now petitioners (ſeveral of whom had bills depending in *Chancery* and *the Exchequer* for ſetting aſide the ſaid ſales of ſhares) inſiſted, was fraudulently taken out.

Bankrupts.

Certificate allowed, notwithſtanding a ſuſpicion in the court of the view in taking out the commiſſion.

LORD CHANCELLOR.

I have myſelf very great jealouſy and ſuſpicion concerning the view, with which this commiſſion was taken out; and therefore gave the utmoſt latitude to the petitioners to have inſpection of books and papers to make inquiry into the bankrupt's affairs, and with greater latitude than in moſt caſes; becauſe it was giving this liberty to them, before they were creditors under the commiſſion: but another view, I had, was my diſlike to traders in *Ireland* coming over here, and obtaining commiſſions by colluſion againſt them-

Trader in *Ireland*, &c. contracting debts here, and coming over, commiſſion may be taken out: but liberty to creditors in *Ireland* to come and prove debts.

themſelves; therefore I gave this liberty to ſee, if there were any creditors in *Ireland*, who might come over, and prove their debts by the commiſſion, that they need not be ſurpriſed; for as there they have no acts of parliament touching bankruptcy, it would be miſchievous to creditors in that country, if this method was allowed. But here has been no application to me to ſuperſede this commiſſion; therefore it is not now before me to conſider, whether regularly taken out, or whether there was a ſufficient debt; or whether the bankrupt was a ſufficient trader in *England* to ſupport the commiſſion: for in ſuch caſe application ſhould have been to ſuperſede it: but if that had been the caſe, it would have failed; becauſe it has been determined, that where a man, reſiding in one part of the realm or in other countries, contracts debts here, if he comes over here, a commiſſion of bankruptcy may be taken out againſt him, as in the caſe of thoſe who reſide in the *Plantations:* although that may be managed ſo as to be attended with inconvenience as between *England* and *Ireland*. But the queſtion now is, whether there is ſufficient ground to allow this certificate or diſallow it? As to that I ſit here in execution of an act of parliament directing, under what terms a bankrupt ſhall have his certificate, requiring it to be ſigned by four parts in five in number and value of the creditors, who proved their debts under the commiſſion, which muſt be allowed by the commiſſioners, and afterward by the Lord *Chancellor*, or two judges to whom he ſhall refer it, without whoſe allowance it cannot have effect. There are no compulſory words in the clauſe to oblige the Lord *Chancellor* or the judges to allow the certificate; nor do I know, that a *mandamus* would lye to them; for it is a matter of judgment: yet not arbitrarily ſo, for they muſt proceed by rules; otherwiſe proceedings under commiſſions of bankruptcy would be very precarious. Theſe rules are pointed out by the act of parliament; but if theſe requiſites are complied with, the Lord *Chancellor* ought to allow the certificate, and not arbitrarily ſay, he will diſallow it. If not complied with, or if there is ground for the Lord *Chancellor* to think, there is fraud or concealment, he may abſolutely diſallow it, as he may for fraud or miſbehaviour in the bankrupt himſelf. Which brings it to the queſtion, whether there is ſufficient ground from the behaviour of the bankrupt on his books and of the aſſignees, whether there have been fraudulent acts or concealment? Another queſtion is, whether the petitioners have ſtated themſelves in the condition of proper perſons to oppoſe that certificate?

Form of granting certificate, a matter of judgment; but not arbitrarily diſallowed, if requiſites complied with: unleſs fraud or concealment.

But firſt to conſider it on the merits. There was to be ſure great ſuſpicion from appearances, particularly from the great haſte in obtaining this certificate. It was a caſe ariſing in *Ireland*,

where there might be a great many creditors, who ſhould have an opportunity to prove their debts; therefore I thought further time and conſideration requiſite; which has been had, and the books brought over from *Ireland*, and as much as poſſible opportunity given to inſpect them. The great objection that appeared on the inſpection, and which ſtruck one at firſt, was the great difference between the account in *Williamſon*'s books and that ſet out by *Mackay*: but that is ſatisfactorily accounted for, at leaſt at preſent: for it is ſworn, there was great imperfection in the bankrupt's books: and from ſuch negligence in accounts bankruptcies often happen. But theſe *items* appearing in authentick books of the bankrupt, whether in letter-books or other books it is the ſame as to the juſtice of the caſe, that being a foundation afterward to carry them into the proper books and to conſider the reſult of the whole, which is an anſwer to the objection. Another thing, that ariſes, is, that if there had been creditors in *Ireland*, who had reaſon to complain, and could have come in, and proved debts under this commiſſion, or ſhewn fraud in the bankrupt as to his eſtate and effects, this length of time taken, which is above a year and a half, would have given opportunity for it: but none have come in. There is no ground therefore from the merits of the caſe to refuſe the ſigning this certificate; for bare jealouſy and ſuſpicion (which, I cannot ſay, but I have) is not ſufficient to proceed on.

Affidavits of debts by petitioning creditors neceſſary.

But all this may be out of the caſe, when we conſider the queſtion I poſtponed, though firſt in the order of things, whether the petitioners are now proper to object to this certificate? Their firſt application produced an order 2d *Auguſt* 1749, whereby liberty was given to one *Sharp* to prove his debt, and that ſuch other of the petitioners ſhould proceed with their ſuit with effect; and the making any dividend was ſtaid. Conſider the making that order. Several petitioners applied to me: none but *Sharp* had then made affidavit of a debt; to whom only I could give liberty to come and prove debts; as he only had laid a foundation for it; the other petitioners, plaintiffs in the cauſes in *Exchequer* and this court, not having by affidavit laid a foundation to ſhew there was a debt. But I did the utmoſt I could, for them; though they had not laid the common foundation for liberty to go before the commiſſioners to prove debts, I ſuſpended, that they might have time to do it. *Sharp* has gone before the commiſſioners, and claimed a debt, but not proved it. It is not enough to lay before the commiſſioners a judgment or bond; that will not do without an affidavit; for all that may be by colluſion: but neither is done. His meaning was, that, as he had the perſon in execution, if he had proved his debt, he would be put to his election to take relief under the commiſſion or to proceed

Creditor under execution muſt elect to proceed at law or under commiſſion.

proceed at law. The other petitioners have done nothing: it is ſaid, they are only plaintiffs in equity, and could not do it: but equitable as well as legal demands may be proved under a commiſſion, though an equitable creditor cannot take out a commiſſion. There would have been a proper ground for the commiſſioners to admit them as claimants; and then it would have been for the judgment of the court, whether they would have ſuſpended the ſigning the certificate, till the cauſes brought to ſet aſide thoſe bills of ſale were determined: but barely coming before the commiſſioners, and ſaying there is ſuch a debt, is not ſufficient without an affidavit. Conſequently no perſon before me has a right to diſpute ſigning this certificate, there not being ſufficient to bring them within the rule. It is a maxim, that there muſt be an end of things; I muſt not delay for ever; and very full time has been given for every perſon from *Ireland* to come before the court, if they thought fit.

Equitable demands proved under commiſſion: though equitable creditors cannot take it out.

The certificate therefore muſt be allowed.

Caſe 81. Rigden *verſus* Vallier, *March* 25, 1751.

ſ. c. 3. Mr Atk. 731.

Father by deed grants lands in conſideration of natural love to two children and their heirs equally to be divided between them: a tenancy in common.

This a covenant to ſtand ſeiſed.

GEORGE EVERINGDEN in 1710 executed a deed, "to all chriſtian people to whom this preſent writing ſhall come, I *George Everingden* in conſideration of the natural love and affection I bear to my wife and children, and for the firm ſettling and aſſuring of all my real and perſonal eſtate on my ſaid wife and children after my deceaſe, give, grant, and confirm to my daughter *Margaret* a parcel of land (not now in queſtion.) Next I alſo by theſe preſents give, grant, and confirm unto my two daughters *Margaret* and *Hannah* the rents and profits of certain lands (which he particularly deſcribes) during the life of my ſaid wife, equally to be divided between them, paying 5 *l. per Ann.* to my wife; and after deceaſe of my wife my ſaid two daughters *Margaret* and *Hannah* to have the ſaid laſt mentioned lands to them, and their heirs for ever equally to be divided between them; and laſtly I do give, grant, and confirm to my five daughters (enumerating them) all my perſonal eſtate equally to be divided between them after all my debts and funeral charges paid and ſatisfied."

This was ſigned and ſealed by him in preſence of three witneſſes. He died in 1714; his wife died; as did alſo *Hannah*, one of the two daughters, after having married *Rigden*, by whom ſhe had the preſent plaintiffs who brought this bill as co-

heirs

heirs of *Hannah*, tenant in common with defendant *Margaret* under this ſettlement and diſpoſition, for account of rents and profits of a moiety of this eſtate, the value of which eſtate was about twenty pounds *per Ann.* to have a partition and deeds and writings produced and ſecured.

For plaintiffs. The whole depends on a queſtion of right, turning upon the words *equally, &c.* being in a covenant to ſtand ſeiſed to uſes. In *Fiſher* v. *Wigg*, 1 *Wil.* 14, 1 Lord *Ray.* 623, are all the authorities on this head, that theſe words make a tenancy in common. They clearly do ſo in a will; and ſo from the nature of this proviſion, by a father for his children, ſo that he could not mean a ſurvivorſhip; for he muſt ſuppoſe, every child may have iſſue, and be the root of a family, whom he could not mean to exclude. The ſame words are uſed in diſpoſing his perſonal eſtate, where there is no doubt of his meaning, which could not be to go to the ſurvivors of the five. Then the queſtion is whether there is any rule of law, ſaying that intent ſhall not prevail; or whether there is any thing to prevent it, from the nature of this as a conveyance? This falls under the rule of wills, not of conveyances at common law; ſo that the ground, why theſe words make not a tenancy in common, in common law conveyances, holds not as to a deed to uſes; which requires not technical words, as deeds at common law do, but operates according to the intent, which may be expreſſed in any words, and ſhall have a more liberal conſtruction. It is always a queſtion of conſtruction, whether the words uſed ſufficiently ſhew the intent of the parties; for that muſt be ſhewn. If grantor had ſaid *to hold as tenants in common, not as jointenants*, it would then have been plain; and there is no difference between uſing the words themſelves, or ſuch as neceſſarily imply it. There never was a caſe even on the ſtricteſt deed, where theſe words were determined to be a jointenancy. This was fully argued in *Fiſher* v. *Wigg*, where it was held, that in a ſurrender of copyhold to uſes, theſe words make a tenancy in common, againſt *Holt C. J.* who cites no authority for his opinion. This has ſtood ever ſince; is the lateſt; and is warranted by the majority of the court in *Smith* v. *Johnſon*, there cited; and as it has ſtood ſo long, though perhaps at firſt indifferent which way determined, there is no reaſon to deſire to ſhake it; for that would be leaning on technical, artificial reaſonings, againſt the real juſtice of the caſe, and meaning of the parties; for if the meaning did not imply it, it would not have that conſtruction in a will. Where no preciſe form of words is required, (as there is not to make a tenancy in common) a liberality of conſtruction is introduced ſince the ſtatute of uſes, which was not before; as in ſpringing uſes and in the conſtruction of powers, which before were conſtrued rigorouſly.

There are other authorities beſide ; as 2 *Ven.* 365, not ſo ſtrong as this ; for there the words *equally to be divided* came before *their heirs* ; alſo the note of *Hammerton* v. *Clayton* 1 Lord *Ray* 631. A queſtion of this kind came before Your *Lordſhip* lately in *Baugh* v. *Herbert*, on a conveyance on the ſtatute of uſes to four, and the heirs of their bodies ſhare and ſhare alike : Your *Lordſhip* ſtopped the cauſe ſhort, and ſent it to *B. R.* but the parties having agreed, it was never argued. This eſtate being of ſo ſmall value, it would be mercy to the parties for this court to determine it: nor is there difficulty or danger in determining it, the authorities being of that ſide to which a court of juſtice leans, in favour of the intent againſt a jointenancy, which the court now does certainly not favour.

For defendant. This queſtion has never yet been ſettled. The ground, upon which the plaintiffs have gone, is, that a tenancy in common was certainly meant from the conſtruction courts of juſtice have put on ſimilar words in wills, which are conſtrued by intent of the parties on the face of it. But this was not the intent: and though ſimilar words in a will may carry that intent, that is no argument. A deed muſt be underſtood in that ſenſe, the law puts on the words ; and the maker muſt be ſuppoſed to underſtand it, as the law does ; and therefore may be preſumed to mean different, from what it would be in a will. The words mean only an equal diviſion of the profits ; which may be effectually anſwered by a jointenancy as well as the other ; for a jointenancy conveys a right to each party to have a moiety ; and the conſequence of ſurvivorſhip does not follow to be in the party's view: as where one creates an eſtate tail, he does not immediately conſider the conſequences of its being barrable by fine or recovery: therefore he is not neceſſarily to be preſumed to think of ſurvivorſhip : nor will the court conſtrue theſe words different from what the law ſays, when the words do not on the face import that. There is a plain diſtinction between conſtruing the ſame words different in a will and a deed ; for in a deed the law puts that conſtruction, which is a ſufficient foundation for the court to put the ſame. Wherever an eſtate is conveyed to two by one title, it is a jointenancy ; where two diſtinct ſeveral titles, a tenancy in common. *Co. Lit.* Then the right of ſurvivorſhip does not ariſe from the particular intent of the parties to make it ſo, but from the eſtate, as a neceſſary conſequence of a ſeparate or joint title. A jointenancy cannot be made a tenancy in common, *et e contra* ; ſo that if this is but one title, it cannot be in common; differing from a will, which ariſes merely from intent of the party, the law allowing to have its operation : but in a deed the law not allowing it becauſe contrary to the nature of the conveyance. The addition of *equally to be divided* does not from the nature

Jointenancy and tenancy in common, diſtingniſhed.

nature of the conveyance give them ſeparate eſtates; only ſhewing they ſhall enjoy in equal moieties, which is conſiſtent with claiming under one title, conſequently with jointenancy. As to this being a covenant to ſtand ſeiſed, and therefore to have a more liberal conſtruction than common law deeds, there is no ground for that; which would cauſe ſtrange confuſion, and deſtroy the ſole reaſon, why a favourable conſtruction is given to wills in oppoſition to deeds, becauſe in one teſtator is ſuppoſed *inops conſilii*, in the other not, and what the ſtatute of uſes never intended. The ſtatute intended to convert every thing, which was a truſt at common law, (as a uſe was) into a legal eſtate; not converting the eſtate into the uſe, but *e contra*; and therefore all ſpringing uſes and executory deviſes are allowed, only becauſe before the ſtatute there might be ſuch, to ariſe by many kind of conveyances, provided within a compaſs of time, not tending to perpetuity. *Fiſher* v. *Wigg* was a very doubtful caſe, and ſeldom has been cited with any certainty of reliance on the authority: beſide it is ſaid in *Stringer* v. *Philips*, as in *Eq. Ab.* 291. that caſe was reverſed: and though it ſhould not be ſo, yet that, together with the fact of no judgment of it appearing on record, is a proof, that the parties made it up, and an appeal was adviſed; all which goes a good way to take off its force as a precedent.

Lord Chancellor was at firſt not inclined to determine it, as it was barely a legal title: but ſaid, he would look into it, and come at it, if he could without determining a point, which might affect ſeveral other caſes, which he muſt not do notwithſtanding the ſmall value, but the parties muſt go further.

This day he delivered his opinion.

I have conſidered this cauſe as fully, as I could; and will tell my thoughts with this declaration at the ſame time, that if either of the parties are deſirous to have it further conſidered in a reaſonable way ſo as to avoid expence, I ſhall be willing to put it in that way.

The queſtion is, whether a jointenancy or in common, depends on a deed or writing; for, though executed as a deed, I am not ſure, it was intended to take effect as a deed. It begins as a deed poll: but is a diſpoſition of his whole real and perſonal eſtate, and to take effect after his deceaſe, in conſideration of, *&c.* If this is not a will or a covenant to ſtand ſeiſed, it would be void, being without livery, becauſe a freehold cannot paſs *in futuro*: but being in conſideration of love and affection, though by ſingle deed without livery, it may be good by way of covenant to ſtand ſeiſed, becauſe that does not operate by tranſmutation of poſſeſſion, but the uſe

Deed in conſideration of love and affection good without livery as a covenant to ſtand ſeiſed.

uſe remains in grantor until taken out of him by force of the conſideration.

What words make tenancy in common in a will.

This queſtion depends on a very litigated and diſputed point in the books, though clear in one view; the words *equally to be divided* in a will certainly making a tenancy in common, as now eſtabliſhed, though that was at firſt doubted. Without the word *divided* it would be tenancy in common; as if deviſed to them equally; or ſhare and ſhare alike. But it is ſaid, there is no ſufficient authority that this would make tenancy in common in a deed, and that the books and caſes take it to be otherwiſe. It is true, the books do generally, where this ſubject is mentioned, take it to be otherwiſe: yet there is no ſolemn determination that I can find on that particular point, where it is adjudged againſt a title on that foot, *viz.* that *equally to be divided* will not make a tenancy in common in a deed: though it is ſaid over and over again to be ſufficient in a will, though not in a deed. The only ſolemn determination then is *Fiſher* v. *Wigg*; which is relied on as a judgment of *B. R.* that in a ſurrender of copyhold to uſes, theſe words make a tenancy in common. But it is objected thereto as a doubtful authority, as but the opinion of two judges againſt ſo great a man as *Holt*; and it is further ſaid to be apprehended, that judgment was reverſed. On ſearch I cannot find it to be ſo, or that a writ of error was brought; ſo that judgment ſtands, and is ſo far an authority, that that is the conſtruction in caſe of ſurrender of copyhold lands. Another caſe was cited, which paſſed as an authority by the judges in that caſe, *viz.* 2 *Ven.* 365. which, if rightly reported, is in point. I cauſed the *Regiſter*'s book to be ſearched, and cannot find any decree entered to warrant this report: but it is cited by *Gould* J. and it is taken, that there was ſuch a caſe: and it might be ſo, though not entered, for the parties frequently acquieſce, and there is often ground to proceed no farther. As to *Hammerton* v. *Clayton* I cannot conceive, how Sir *Edward Northey*, (who was of counſel on the other ſide) ſhould be at the pains to cite a caſe not in the books, but merely on record, againſt his client: however I deſired a ſearch to be made in *C. B.* for the record of that caſe, and it is not to be found on the judgment roll mentioned in the book. There is another authority (ſuch as it is) of *Smith* v. *Johnſon*; which, if rightly ſtated, was on a feoffment, and was not diſputed by *Holt*; which is a countenance therefore for this opinion, and the authority of two judges againſt one ſtill remaining and ſtanding. Which brings it to the queſtion, how this is to be determined? On the beſt conſideration I am inclined to be of opinion, that on this deed or inſtrument (call it as you will) it makes a tenancy in common; and that it would be a direct contradiction to the manifeſt intent of this father, who was providing for his children, to ſay otherwiſe. I have conſidered the arguments in *Fiſher* v. *Wigg*;

Wigg; and it is truly ſaid at the bar, that there is nothing more to be ſaid on either ſide, than is ſaid there. Though no one has more reverence for the opinion of *Holt* C. J. than I have, yet I think the arguments of the other judges more founded on the nature and reaſon of the thing, and that *Holt*'s is more founded on artificial arguments of the law, and drawn out from a great deal of fine learning from arguments in other caſes. *Gould*'s argument has great weight, and is not to me ſatisfactorily anſwered. That caſe was indeed on a ſurrender of copyhold lands in the *Lord's Court*; and the judges, who argued to make it a tenancy in common, held, that ſuch a ſurrender was not to be conſtrued in the ſtrictneſs of the thing, but like a will. *Holt* contended, it muſt be conſtrued as a deed: in one thing he was certainly right, that a ſurrender of copyhold lands to uſes is not to be conſidered on the foot of a uſe or truſt, for they are not within the ſtatute of uſes; therefore ſuch ſurrender is only a direction to the Lord whom to admit; and when admitted, ſurenderee is in by grant of the Lord, not of the ſurrenderor; ſo that it is of a particular nature, not as a uſe or truſt on the ſtatute. But the arguments of the judges, is of weight in that caſe, hold full as ſtrong in a covenant to ſtand ſeiſed; as this (though I am not quite ſure, whether it was meant a deed or a will) will be conſtrued, the uſe till the event happens remaining in the grantor being ſufficient to ſupport the uſes declared in the deed. But it is objected, that there is no warrant to conſtrue a deed to uſes as to the limitations and words of it, in a greater latitude than a conveyance by way of feoffment or other conveyance at common law, and if conſtrued in a different manner would cauſe great confuſion: which I hold to be true in general: for the ſtatute joining the eſtate and the uſe together, it becomes one entire conveyance by force of the ſtatute, and the words are to be conſtrued the ſame way: but this is to be taken with ſome reſtriction. As to the words of limitation in a deed, they are to be ſure to be conſtrued in that manner, *viz.* in the ſame ſenſe; but where they are words of regulation or modification of the eſtate, as the words *equally to be divided* are, and not words of limitation, I think, there is no harm in giving them greater latitude in deeds on the ſtatute of uſes, which are truſts at common law, than on feoffments, which are ſtrict conveyances at common law. The caſe cited by *Gould* J. from *Co. Lit.* 190. *b.* as to a verdict is very material to the preſent. The only diſtinction taken between the conſtruction of words in a verdict and in other caſes is this: in a ſpecial verdict words may be conſtrued more largely than in pleading: and therefore it is often ſaid, that in a verdict a deſcription, that would be bad in a count or plea in bar, may be good in a verdict, and taken by intendment of the jury: but there is no book, ſaying that words may be taken more looſely in a ſpecial verdict than in a deed. It is admitted, that if he had ſaid, "to hold one moiety to one and her heirs, and the

Surrender of copyhold to uſes not within ſt. of uſes.

Deed to uſes not conſtrued in greater latitude than common law conveyances as to words of limitation: otherwiſe of words of modification of the eſtate.

Ashleigh v. Brace 5. Mod. 266.

Words in a verdict conſtrued more largely than in pleading.

" other moiety to the other and her heirs," it would have been good not only in ſuch a deed, but in a feoffment; and conſidering how the ſenſe of theſe words *equally to be divided* is now eſtabliſhed there is no reaſonable difference. Thus it ſtands on the authority of *Fiſher* v. *Wigg*: but there are other reaſons in the preſent caſe greatly ſtrengthening it in favour of the plaintiffs: firſt this was a father providing for his children, and muſt be conſtrued therefore to make a proviſion for their families; and it is not reaſonable to think, he ſhould make it ſo, that if one died, her proviſion ſhould ſurvive to the other; which is the conſequence of a jointenancy, and cannot be ſuppoſed to be his intent. This court has taken a latitude in conſtruing a tenancy in common without the words *equally to be divided* on the foot of the intent; and therefore determined, that if two men jointly and equally advance a ſum of money on a mortgage, ſuppoſe in fee, and take that ſecurity to them and their heirs without any words *equally to be divided between them*, there ſhall be no ſurvivorſhip; and ſo if they were to foreclоſe the eſtate, the eſtate ſhould be divided between them, becauſe their intent is preſumed to be ſo. It has been ſaid indeed, that if two men make a purchaſe, they may be underſtood to purchaſe a kind of chance between themſelves, which of them ſhall ſurvive: but it has been determined, that if two purchaſe, and one advances more of the purchaſe-money than the other, there ſhall be no ſurvivorſhip, though there are not the words *equally to be divided*, or to hold as *tenants in common*; which ſhews, how ſtrongly the court has leaned againſt ſurvivorſhip, and created a tenancy in common by conſtruction on the intent of the parties. How nearly does this come to the preſent caſe? There is indeed no conſideration here; only a voluntary act: but the court always conſiders proviſions for children as having an equitable conſideration: and therefore though the court cannot prefer ſuch voluntary diſpoſitions to debts for valuable conſideration, yet they are always preferred to other voluntary diſpoſitions. Then why may not the court as in other caſes conſtrue according to the intent, which was to provide for their families? But this man has put his own conſtruction on theſe words in the diſpoſition of his perſonal eſtate, which is allowed to be a tenancy in common; then it is very extraordinary, that he ſhall be preſumed to uſe them in another part of the deed ſo as to defeat his intent. Another thing is, that this appears to be as near a teſtamentary act, as can poſſibly be; nor do I know, why this may not be proved as a will in the Eccleſiaſtical court, notwithſtanding the ſolemnity of execution by ſealing and delivery, according to the caſe of *Kibbot* v. *Lee*; for there was a will ſealed and delivered; and in a late caſe of *Trimmer* v. *Jackſon* in *B. R.* ſent out of this court. He makes uſe indeed of the words give, grant, and confirm: but that is not material: and then ſays after his deceaſe: ſo of his perſonal eſtate after his debts and funeral paid; which is plainly a teſtamentary diſpoſition, his whole perſonal eſtate being in his power during his life, and they are in the caſe of reſiduary legatees.

Tenancy in common on the intent without words equally, &c.

The court leans againſt ſurvivor.

Equitable conſideration in proviſions for children; and preferred to voluntary diſpoſitions.

This near a teſtamentary act.

tees. So that it appears to be in his view as a teſtamentary act: and admitted, that in a will theſe words make a tenancy in common: and I think, it ought to be ſo conſtrued here. My opinion therefore at preſent is, that agreeable to *Fiſher* v. *Wigg*, ſtrengthened by thoſe further obſervations, the plaintiffs are intitled to have a decree for the diviſion of this eſtate. But notwithſtanding that I own, I am ſatisfied, yet as it is liable to objection, from what is ſaid in the books, and the doubts thrown out of this authority of *Fiſher* v. *Wigg*, if the defendant is deſirous of having it further conſidered, I will not ſend a caſe to all the judges of either court; becauſe they now put theſe cauſes in a new way in the paper as other cauſes; which may be very proper in caſes of value, but, creating a great deal of expence to the parties, this caſe will not bear it; if deſired therefore, I will take a method, often uſed by my predeceſſors antiently, of ſending it to two particular judges, who then will hear it at their chambers.

Oldham *verſus* Hand, *April* 24, 1751. Caſe 82.

ON a conteſt in the Eccleſiaſtical court for an adminiſtration it was granted to the plaintiff and another. The widow of the party threatened to appeal; they deſired the defendant an attorney to make it up between them. It was compounded; and afterward, when the whole was finiſhed, they voluntarily agreed to give him 2000 *l.* a-piece; and that, as he ſwore, without any ſolicitation from him. They reſt on this for ſeveral years; when a bill was brought to impeach it: after anſwer put in the plaintiff ratifies and confirms it.

Gift to attorney after the cauſe over, without any diſtreſs, not ſet aſide: otherwiſe if before or during the cauſe.

For plaintiff. There is a ſtrong relation between an attorney, who is in nature of a ſworn officer of the court, and his client; and on that all tranſactions between them are examined into; if therefore an attorney, retained to appear, does not, the court will make a ſummary order, and compel him; and not leave it to an action as in other caſes: nor will an attorney be ſuffered to be changed without leave of court. If an attorney pending the tranſaction gets from his client an extraordinary ſecurity for payment of money, or extraordinary conveyances of any part of his eſtate, it will be ſet aſide without any particular evidence of impoſition; for a gift ſhall not be taken without letting the client ſee, what is the demand: he is not allowed to take a preſent without a bill brought in, though a client may be allowed to be generous, and give more than the bill. The rule is the ſame on guardian's getting a preſent on the ward coming of age, though no proof of actual impoſition at the time. In *Pierce* v. *Waring* * 13 *Nov.* 1745, the defendant having been guardian, after plaintiff's coming of age on ſettling accounts took a voluntary

Guardian ſettling accounts as ſoon as infant came of age, and retaining a gratuity, ſet aſide.

* Cited Ante in Cray v. Mansfield 7 Feb. 1749-50.

1. Ves. 380.

voluntary preſent, which your Lordſhip ſet aſide merely on that, as dangerous. So in *Walmſley* v. *Booth* on a bill by repreſentative of *Japhet Crook* to ſet aſide a bond by him to his attorney to pay 1000*l.* there was no ground to impeach it on the particular evidence as not voluntarily done, nor as any actual impoſition; the bill was diſmiſſed; it came on a rehearing, and was then argued laying all the particular proofs out of the caſe; and on reconſidering it, and the conſequences that would otherwiſe be, your Lordſhip gave relief. That was grounded on *Hine*'s Caſe, which was determined on the ſame reaſoning, and affirmed in *Houſe of Lords*; it was a bill to ſet aſide a ſecurity, ſaid to be a gratuity for ſervices, though it might be more, than would be allowed on a taxation; Lord *Talbot* relieved, except as to what he really deſerved, decreeing the bond to ſtand as a ſecurity for ſuch. This caſe is the ſame; being in nature of a ſecurity a transfer to him who has other parts of the eſtate in his hands, and is to account for the whole. The bill demands a general account of the eſtate: the defendant inſiſts on allowance of 4000*l.* no bill is given in: no writing at the time, but barely this transfer.

v.
Proof Hines
~~Tal. 3. Fort.~~
Rep. 221.

LORD CHANCELLOR.

All the caſes cited differ on the material ground. *Waring* had been concerned as guardian, and, as ſoon as the infant came of age, made up the account, and retained that gratuity to himſelf, the ſame influence of the guardian continuing, being done when his effects were to be delivered over. *Japhet Crook* was in diſtreſs, wanting bail, and could not get out of cuſtody, unleſs this attorney would get it for him; and the attorney took the bond, before he would do it, being employed by him: the court would not ſuffer that to ſtand. *Hine*'s Caſe was a bond to a perſon, who pretended to have it in his power to procure evidence, and, before he would do it, took this bond by way of ſecurity: the court would not ſuffer that to ſtand, becauſe done not by way of reward, but before hand when under diſtreſs for evidence to prove the title ſet up. This is a very large gratuity indeed; though there had not been that ſubſequent ratification, I do not ſee, how I could come at it; for it is not obtained by an attorney during the courſe of the cauſe, or before it, but the whole was over, and they are judges what to give: much leſs can I ſet it aſide. I have heard of attorneys and ſolicitors, who undertake a cauſe not only to manage, but to find evidence. I do not know, how I could come at that even: it is ſecret in the minds of people, who know, on what grounds they go, and are better judges often, of what an attorney deſerved, than the court can be: and when they without any diſtreſs judge of the gratuity they think fit to give, the court will not ſet it aſide: though if it could be come at, the court would indeed in ſuch a caſe cenſure it: but this is alſo ratified, which makes it much ſtronger. The bill therefore muſt be diſmiſ-

ſed

ſed to this 4000 *l.* inſiſted upon by the defendant as a preſent and gratuity to him.

Hubert *verſus* Parſons, *April* 29, 1751. Caſe 83.

On marriage articles 9000 l. in truſt for husband and wife for life, and for eldeſt ſon ſubject to raiſe and pay 5000l for younger children as father ſhould appoint; for want of appointment at twenty-one; the intereſt for maintenance. Mother dies, only one younger ſon then, who dies two years old. Father cannot claim this 5000 l. as his repreſentative; not veſting in the children. There are no words for veſting except thoſe for raiſing and paying, at twenty-one.

BY marriage-articles truſtees were to pay the dividends and produce of 9000 *l.* ſtock to *Philip Hubert* for life, and from and after his deceaſe his wife, if ſhe ſurvived him, ſhould have it for her life; and on truſt by mortgage or ſale, in caſe of more than one child of ſaid marriage, to raiſe 5000 *l.* and pay it to ſuch child, not being an eldeſt ſon, at ſuch time, and in ſuch manner and proportion, and with ſuch reſtriction, as the ſaid *Philip Hubert* in his life or by will ſhould direct, limit, and appoint; for want of appointment to pay the ſame to ſuch younger ſon or ſons, daughter or daughters, at twenty-one; and till ſuch ſhare or ſhares of younger ſon or ſons, daughter or daughters, become payable, the intereſt ſhould be paid toward maintenance and education; if any of theſe younger child or children died before payable, it ſhould ſurvive, except to the eldeſt ſon: provided that, if no appointment of the payment of the portions by the father, the truſtees ſhould have power to raiſe part of this money, or the whole if they thought neceſſary, for advancement of that younger child, as wanted it: and ſubject only to the drawing out theſe proviſions, all was given and ſettled on the eldeſt ſon: if no iſſue of the marriage then in truſt for *Philip Hubert*, his executors, adminiſtrators, and aſſigns.

At death of the mother there were only two ſons; the youngeſt died when but two years old; the father had made no appointment, and brought this bill claiming the 5000 *l.* as adminiſtrator and repreſentative to the deceaſed younger child; for though the time of raiſing was not yet come, it was abſolutely veſted in that child, and tranſmiſſible; as after the mother's death there could be no other. The queſtion is not on the time of payment, but on the penning of the deed, whether it veſted or not? No act could take from the father the benefit of the whole produce during his life; yet as to the children the reverſionary intereſt was to veſt in his life. If an eldeſt or only ſon lived to an age ſufficient to make a will, and gave this away, the father could not have claimed againſt that, the contingency on which it was given over to him not having happened: ſo if the ſon had ſold or incumbered it. Suppoſe one only younger child, who attained twenty-one, money given out of a reverſionary intereſt, and therefore poſtponed for the ſake of the particular perſon who was to enjoy the uſe during life, veſts notwithſtanding a particular time of payment. This is a queſtion of a younger ſon dying under twenty-one. There is an eſtabliſhed diſtinction (on what foundation of reaſoning is not now to be inquired) between the time

of veſting and of payment as to perſonal eſtate, that notwithſtanding the day of payment is poſtponed it ſhall be tranſmiſſible: although in favour of land if the perſon dies before time of payment, it ſhall ſink. The ſame diſtinction governs as to perſonal eſtate ariſing on a declaration of truſt, as it would on a will. There is no authority ſaying, that as to a declaration of truſt of perſonal eſtate it ſhould be conſidered as land: though often determined to be ſo on a will. On deviſe of reſidue of perſonal eſtate to wife for life, and afterward to other perſons, one of whom died in her life, Lord *Talbot* held, his executor ſhould come in for an equal ſhare, becauſe the intereſt veſted. The only doubt, that can be, is whether it ſhould be payable immediately to the repreſentative, or only at ſuch time as if the child had lived to that age: but the court never conſiders it ſo in the caſe of a child. Though the father has power to anticipate the day of payment, yet, being but one younger child, his power as to the quantity and ſubſtance of the gift was at an end: if more, it was uncertain during the father's life, what particular ſhare any one child could take: if they could take, it muſt be as joint-tenants: but, being only one, there is an end of that and of all the conſequences: he cannot intail or give part of it over on any reſtriction, for the whole 5000 *l.* muſt go to that one: ſo that he could only alter the day of payment, the ſum veſting independent thereof. The deed ſhews it was ſo meant; for the whole intereſt is to be paid in mean time, not ſuch part as ſhould be thought proper for maintenance. The drawer thought it tranſmiſſible, having made a ſpecial proviſion againſt it on the death of one under twenty-one, they had no view to the ſinking into or concern for the eſtate; for the power of accelerating payment is not to the father only, but to the truſtees if they thought fit.

LORD CHANCELLOR.

This is a claim ſet up by the father in direct contradiction to the intent of the parties in theſe marriage-articles. On one ſide, I think the authorities, that have been on the caſes of portions to be raiſed out of lands, are to be laid out of the caſe, and cannot be argued from in favour of the defendant. On the other ſide the authorities cited, or which can be cited, on wills or te aments concerning perſonal eſtates are to be alſo laid out of the caſe; becauſe the rules and determinations in this court on portions or legatory portions by will are drawn from the Civil law or Eccleſiaſtical court; which cannot take place in this caſe ariſing on articles, a deed at common law: though as there is a truſt in it, that muſt be conſtrued in this court, and cannot be governed as to the rules of the Eccleſiaſtical court, or the rules as to real eſtates. The queſtion is upon the conſtruction of the deed and intent of the parties; which was, that ſubject to the proviſions therein the whole ſhould be ſettled for benefit of the eldeſt ſon; nothing therefore could be taken from him but according to the

Portions by will governed by rules from civil law or eccleſiaſtical court: not applicable to a deed.

the intent of thoſe proviſions. That intent was plainly this, to take out of this 9000 *l.* (a fund provided for the eldeſt ſon) 5000 *l.* for younger children by way of portion; which muſt be conſtrued in a reaſonable ſenſe, when they ſhall be ſuppoſed to want the portion; and if any doubt on the conſtruction of theſe contingencies and the words uſed it muſt be conſtrued accordingly. All the ſubſequent truſts are reſtrained to ariſe after deceaſe of the father. The time and the occaſion both of raiſing and paying the 5000 *l.* are quite uncertain, becauſe ſubject to the power of the father. I agree as to the power of proportioning, that was in caſe of more than one younger child: but ſtill the father had power to direct the time of payment and the manner, though but one younger child. He might have accelerated the payment before twenty-one, or poſtponed it till a time after twenty-one. So alſo as to the manner and application; for he might have ſettled it for benefit of the family, it being *with ſuch reſtriction, &c.* The power of raiſing and paying is directed and limited in the ſame words. There are no words to create any veſting except thoſe for raiſing and paying, which are at twenty-one. Suppoſing it had been in a covenant, and the child had died before twenty-one, it never could become due. It is true, in legatory caſes, where the Eccleſiaſtical court judges that it is veſted; and the time only of payment poſtponed, they hold it tranſmiſſible, though the child dies before twenty-one: but there is no ſuch rule in conſtruction of the deed, if the child died before twenty-one. It is ſaid the direction of the intereſt is an evidence, the thing was veſted; ſo it is in legatory caſes: but this intereſt was not to be paid till after death of the father, who was to have the whole during his life, whatever contingency happened as to his children. The proviſion for a ſurvivorſhip among themſelves is, that neither the repreſentative of a child, nor an elder chi d, ſhould have it. But though by force of the deed it is not payable till twenty-one, yet in default of appointment by the father the truſtees have a power: but that will create no veſting, eſpecially as that power could not ariſe till after the death of the father, and was quite in diſcretion of the truſtees whether they would execute it or not. In his own right the father could not claim any thing out of the capital but in default of iſſue of the marriage. There is nothing from this deed to make the veſting of this 5000 *l.* in prejudice to the eldeſt ſon, who was to take the whole fund ſubject to theſe portions to younger children: if that was the intent of the parties, it would be a very ſtrange intent to give the father a chance of having this large part of this proviſion, who was made but tenant for life by the deed. Where perſonal legacies and portions by wills are given at twenty-one, or no clauſe of gift in the will but the direction for payment at twenty-one; if the child dies before twenty-one, it will not be tranſmiſſible: nay the principal will not be tranſmiſſible, even though

Conſtruction of portions, is when the children want it.

Intereſt evidence of veſting, in legatory caſes.

though this court by its diſcretion had given the child intereſt for maintenance in mean time. If taken on that latitude that wills are, here are no words to create a veſting but the words to raiſe and pay; and the direction of that is, when the child attained twenty-one. If compared to the caſe of portions out of land, (which I have laid out of the caſe) if the child attains twenty-one, and ſurvives the father, and dies, though in life of the mother, his portion ſhall not be raiſed. But according to the true conſtruction of this deed there are two times of veſting; one if the child attains twenty-one though in life of the father, and died in life of the father, yet, having attained twenty-one, by force of the truſt the portion ſhould be conſidered as veſted, and go to the repreſentative. I will go farther. Suppoſe the younger child had ſurvived the father, and died before twenty-one, poſſibly by the conſtruction upon this truſt, being a direction to pay the whole intereſt for maintenance, it might poſſibly go to the repreſentative; becauſe the child was intitled to the whole intereſt in mean time according to the intent; the intereſt follows the property of the principal, as the ſhadow the ſubſtance, and therefore intitled to the principal. But neither of theſe contingencies happened; the child not attaining twenty-one in the life of, nor ſurviving, the father: nor any poſſibility on the conſtruction of this truſt to make any other time of veſting, abſtracted from the time of payment, except thoſe two, neither of which has happened: conſequently this was not a veſted intereſt in the child either on the words of the deed or more ſtrongly according to the intent of the parties. The father then has no right to draw this ſum out of the proviſion for the eldeſt ſon; and the bill muſt be diſmiſſed.

Caſe 84. Blanchet *verſus* Foſter, *April* 29, 1751.

Relief againſt ſecurities, &c. by wife on marriage: unleſs for valuable conſideration, though concealed from huſband: but conceal ment not encouraged; and therefore, unleſs at wife's requeſt, coſts excuſed.

BILL by huſband after wife's death to be relieved againſt a bond given by her to her aunt juſt upon the marriage.

LORD CHANCELLOR.

If a woman about to marry parts with part of her property, or gives a ſecurity or aſſignment, they are relievable againſt in this court: but where a debt is contracted for valuable conſideration, though concealed from the huſband, it is no fraud on the marriage. But concealment of ſuch ſecurities or debts is not to be encouraged; therefore as this was concealed from the huſband at the time and long after the marriage, I ſhould excuſe the huſband the coſts on diſmiſſing his bill, on which I can give no relief, as a conſideration is poſitively ſworn to in the anſwer, and it comes on by bill and anſwer: but it is alſo ſworn, that it was at the requeſt of the wife herſelf, that the obligee concealed this from the huſband. If

therefore ſhe had ſurvived him, ſhe could not have ſaid, her aunt ſhould loſe her coſts becauſe of that concealment at her own requeſt. The plaintiff is adminiſtrator to, and ſtands in place of, his wife; and the bill muſt be diſmiſſed with coſts to be taxed.

Chancey *verſus* Fenhoulet, *April* 29, 1751. Caſe 85.

ſee in 2. Atk. 392. for Chauncey v. Tahourdin in 1742 C

Portion given over on marriage without conſent: defendant not compelled to diſcover marriage.

DEMURRER to bill for diſcovery as to the fact of marriage, by which if without conſent of particular perſons a portion was given over.

It was ſaid, the diſcovery prayed was only of the marriage, not of the conſent; and was compared to an eſtate during widowhood, remainder over; in which Lord *Talbot* held plaintiff intitled to ſuch diſcovery.

ſee however the Attorney General v. Duplessis Park. 144.

Lord Chancellor thought it an extreme hard demand upon the defendant's own diſcovery. When the continuance of an eſtate is only during widowhood, it is no more than a conditional limitation: but this makes a forfeiture of that, which would be otherwiſe abſolutely in the defendant. As to the diſcovery being of the marriage, not of the conſent, that is only in words; for the bill charges the marriage to be without conſent.

Jacomb *verſus* Harwood, *April* 30, 1751. Caſe 86.

At the Rolls.

Intereſt on banker's note from circumſtances, tho' no evidence of agreement for it.

Judgment in action againſt ſurviving partner a partnerſhip-debt ſtill.

Each executor has entire control of teſtator's perſonal eſtate: may releaſe, pay, or tranſfer, without the other. So of one adminiſtrator, tho' formerly queſtioned.

GIBSON and *Sutton* were partners in the buſineſs of a ſcrivener and banker. The mother of the plaintiff Mrs. *Jacomb* and the mother of the plaintiff Mrs. *Long* both kept caſh in this ſhop; and each of them out of the caſh belonging to her ordered a ſum to be wrote off from her account, and that a note or ſecurity for each of theſe ſums ſhould be given to each of the plaintiffs; which was done, and ſigned by the caſhier belonging to the partnerſhip. *Gibſon* ſurvived this about a year and made *Sutton* and another executors. The caſhier by his anſwer (there being no other evidence) believed from entries in the books, that intereſt for this was paid to the death of *Gibſon*, and mentioned payments of intereſt alſo for three years at 4 *per cent.* by *Sutton* after death of *Gibſon*, when in point of law the partnerſhip-effects ſurvived to *Sutton:* but after that the two plaintiffs ſeparately called on *Sutton* for a further ſecurity than thoſe bare notes: and therefore judgment was entered up in an action againſt him not as executor of *Gibſon*, but as a ſurviving partner for a partnerſhip-debt. That judgment was defeaſanced by an inſtru-

ment ſigned by the plaintiffs as to their reſpective demands, agreeing that no execution ſhould be taken on either of theſe judgments until ſuch a time. In that agreement it was particularly inſerted, that theſe judgments thus obtained by the two plaintiffs ſhould not hinder either of them from any remedy, they might be intitled to in a court of equity againſt *Gibſon*'s eſtate or effects, if they were not otherwiſe paid or diſcharged. Immediately before the reſpite of the execution expired, *Sutton*, being called on or knowing that the time was near, mortgaged part of a leaſehold eſtate at *Marybone*, which was confeſſedly part of the ſeparate eſtate of *Gibſon* his deceaſed partner.

One executor may apply in ſatisfaction of his own demand, if no fraud.

Mortgage coming into equity not deſired to go to law, as it muſt finally come round again.

On this foot was the preſent bill, in which the plaintiff joined, brought as partnerſhip creditors to ſubject the chattel intereſt in that mortgage to a ſatisfaction not of a ſingle demand, to which both intitled, but of two ſeparate demands, by a ſale to pay what was due for principal, intereſt, and coſts.

It did not appear, otherwiſe than from the two notes, in what manner the money, thus ordered by the mothers of the plaintiffs to be carried from their two accounts, was left in hands of the partners, whether as caſh kept generally or only thoſe two ſums. The firſt conſideration was, whether this from the time of the notes entered into was ſuch a demand, as in its nature would carry intereſt, which appeared clearly to have been paid from time to time? Next as to what happened ſubſequent to the death of *Gibſon*, *viz.* the judgments at the ſeparate ſuit of the two plaintiffs againſt *Sutton* as ſurviving partner; and whether *Sutton*, being only one of two executors of *Gibſon*, could in point of law make a ſecurity of that ſo veſted in him?

Sir *John Strange*.

No doubt but in the general way of tranſacting, money paid into a goldſmith's ſhop with a common caſh note by that goldſmith will not carry intereſt: but however when two daughters have money advanced by their mothers, come to the ſhop, and demand thoſe ſums, it is not unnatural to think, that, if not paid to them then, there muſt be ſome agreement to let it remain there, not as caſh, but for a profit to be paid to them. There is no evidence of an agreement; but the ſtrongeſt from circumſtances, intereſt being paid for four years from the time, the plaintiffs had that right. The entries in their books (who both knew their buſineſs) are proper evidence of notice that it lay in their hands on the foot of carrying intereſt, and that at 4 *per cent.* which, not being the legal intereſt, affords room to think, there might be ſome agreement.

I

I am not to preſume, a goldſmith's or banker's books have wrong entries. They are always entries at the time: but if not ſo, they are eaſily detected. There is no ground therefore to ſay, the intereſt was wrongfully received or improperly paid, but the plaintiffs will be intitled to retain it.

Next if theſe judgments were obtained againſt him as ſurviving partner on foundation of a ſuit in the life of the two partners, no doubt but that will be at law an extinguiſhment of any remedy, the party might have on the notes in a court of law; for *tranſit in rem judicatam:* it would be the ſame in caſe of a bond, had that been given inſtead of a judgment, it would be at law an extinguiſhment of the ſimple contract-debt: yet it would be a partnerſhip-debt on the judgment ſtill: but this appears to be an action againſt him as ſurviving partner, and therefore I do not know, though it may be an extinguiſhment of the demand on the notes in any action againſt him on them, whether this may be ſet up as a variation of the ſecurity, that the partnerſhip is diſcharged, (as it certainly is as to any action on the notes) and that it is not a partnerſhip-debt. I do not ſee, why I am not to conſider it ſtill as a partnerſhip-debt, only bettered by the ſecurity being converted to a judgment from a common note. Juſt before the expiration of the time, he gained by giving the judgments, is the ſubſequent ſecurity given; it is not therefore an unreaſonable ſuppoſition, either that he was called on, or that, knowing execution might be taken, he applied to them, and offered further ſecurity; which was the ſeparate eſtate of *Gibſon*; on which they would actually have a right to come finally, if they had not ſatisfaction another way. He was intitled thereto as one of the executors of *Gibſon*. Nothing is clearer than this, and I never knew it queſtioned in the caſe of executors, that each executor has the entire controul of the perſonal eſtate of teſtator, may releaſe, or pay a debt, or transfer any part of teſtator's property, without concurrence of the other executor. It has indeed been queſtioned in caſe of adminiſtrators, whether one adminiſtrator had ſuch power equal to that of executor; and the attempt has been to diſtinguiſh that from the caſe of executors, who, it was always agreed, might do ſo; and though in *Hudſon* v. *Hudſon*,[x] it was ſaid, that the *Lord Chancellor* had been of opinion, that one adminiſtrator could not releaſe ſo as to bind the other, yet when that caſe was more narrowly looked into, it appeared clearly, that that was applicable to the particular circumſtances of that caſe; and the words of the decree in that caſe are, that the plaintiffs are not barred by the accounts ſtated or releaſe accepted from demanding an account from the two ſons in a court of equity. But after that, was *Willand* v. *Fenn*,[y] where it was held in *B. R.* after three arguments, that one adminiſtrator ſtood on the ſame ground and foundation with

[x] ſee this case in 1 Atk. 460.

[y] Hil. 11. & 12. G. 2. B. R.

with one executor. The diſtinction taken between them ſeems to ariſe from a *dictum* in *Bacon's Uſe of the Law*, 4 *Vol.* 83. and the Eccleſiaſtical court now hold it neceſſary in the caſe of two adminiſtrators to come back to them on death of one for a probate, though not ſo in the caſe of executors: but the common law is otherwiſe: and Lord *Talbot* in *Hern* v. *Cheny* determined contrary thereto; and in *Raſtal* 560. an action is brought by ſurviving adminiſtrator. If then clearly one executor may without concurrence of the other diſpoſe of and appropriate teſtator's eſtate to the diſcharge of any juſt demand (for if applied by him fraudulently it is a queſtion of another conſideration) how does the preſent caſe ſtand? The plaintiffs were originally intitled to theſe ſums on the note; one partner dies, the other is ſued as a partner, and judgment obtained againſt him: I ſhould ſtrongly incline to think, that notwithſtanding that judgment it ſtill continues a partnerſhip-debt, being obtained as ſurviving partner. But if not ſo; if even it is his own debt, it is ſtill certain, that an executor poſſeſſed, as this appears to be, of the perſonal effects of *Gibſon*, to whom he was executor, might apply any part thereof even to the ſatisfaction of his own demand, unleſs circumſtances of fraud or colluſion. But of that there is no evidence before me, nor croſs bill by the other executor or ſeparate creditors impeaching the nature of this tranſaction; which I muſt take to be fair, for I cannot preſume fraud. It is very material, that the preſent plaintiffs are undoubtedly ſtill creditors unſatisfied; and therefore it is not an application of the ſeparate eſtate of *Gibſon* to demands, which ought not to be countenanced in a court of equity, but to that to which the executor had a right to apply it, and for which perhaps that eſtate of his without this act of *Sutton* muſt have been ſubject to have made ſatisfaction; for certainly the partnerſhip-creditors would have a right to go againſt the ſeparate eſtates of either of the partners after the partnerſhip effects. But this is nothing as to the juſtice of plaintiffs demands, who have uſed diligence to get at their money in a lawful and honeſt way, which all courts encourage; nor is their method taken impeached. They are not then to be blamed, ſuppoſing their demands were againſt *Sutton* on the judgment, in getting the beſt ſecurity they can for their money, which was this mortgage. I ſhould do an injury to this eſtate, if I was to ſay, why do not you go to law? Suppoſe they brought an ejectment at law and recovered, as they might undoubtedly do, this aſſignment being good in law, that would be only turning them round; a bill muſt be brought to redeem; for they would not be allowed to keep this eſtate beyond a ſatisfaction of their demands. Nor do I know any caſe, where a mortgagee comes into equity, that the court deſires him to go to law, and recover as he can; becauſe the court ſees, it muſt finally come round into a court of equity again, and therefore diſpoſes of it at once.

Eccleſiaſtical court requires ſurviving adminiſtrator (though not executor) to come back for probate. At common law otherwiſe.

Note: At the bar was cited *Nugent* v. *Giffard* in 1738, a bill by a bond-creditor of *A.* executor of Sir *Richard B.* for ſatisfaction out of a ſecurity of 3000 *l.* aſſigned to plaintiff by *A.* The daughters of Sir *Richard* inſiſted, they were creditors of Sir *Richard* by marriage articles, and that the fund aſſigned, the benefit whereof was claimed by plaintiff, was part of the ſpecifick aſſets of Sir *Richard*, who under the articles was intitled to the truſt for life, to the wife for life, then to the iſſue, which were only two daughters. *Lord Chancellor* held, that, ſuppoſing them creditors, yet was the diſpoſition by *A.* good; and that they were not intitled to purſue this as ſpecifick aſſets of Sir *Richard*, but plaintiff ought to have the benefit of his aſſignment: that undoubtedly in point of law an executor can alien all the aſſets; and, when ſo diſpoſed of, no creditor can follow them; for the creditor's demand is perſonal againſt the executor, not a lien: that, as to the objection of this court's going farther than a court of law, the court will follow the particular aſſets in caſe of fraud or colluſion, but not ſo where executor diſpoſes of it for valuable conſideration; and it would be very miſchievous, if this court ſhould controul the power of executors. A purchaſer cannot know, what the particular debts are, nor come here for an account of thoſe debts; for his knowledge or not knowledge of the debts in general is immaterial as to the validity of the aſſignment, he obtains, provided it is for valuable conſideration. As to its being equitable aſſets only, and the rule that he muſt take ſubject to the ſame equity, that rule prevails not, where the demand is general, but where a lien on the particular thing: otherwiſe an executor could never diſpoſe of a truſt term: that 2 *Ver.* 616. was ſhortly reported, and grounded on notice to the purchaſer of the particular debt due before his purchaſe, and colluſion between executor and purchaſer, is no aſſignment to *bona fide* creditor.

Iſſue, creditors of teſtator under marriage articles, cannot purſue in equity as ſpecifick aſſets the fund aſſigned by executor to a creditor of his own for valuable conſideration without fraud, and where no lien.

Revel *verſus* Fox, *May* 1, 1751. Caſe 87.

AN eſtate to a woman *dum ſola*, remainder over. Bill by remainder-man againſt her as being married to the other defendant *Fox*, with whom ſhe cohabited for three months. Both defendants by their anſwer denied the marriage: it was endeavoured on part of plaintiff to be proved by circumſtances; and it was ſaid, that this was not in nature of a forfeiture.

Jury proper judges of the fact of marriage denied by anſwer; and always lean to ſupport it for a juſt creditor, when the debt in name of huſband and wife, during cohabitation: if after, doubtful.

LORD CHANCELLOR.

It is very like it, being a conditional limitation of an eſtate which muſt be taken away from her on marriage. If an action was brought againſt the defendants for a debt contracted after three months, and after thoſe appearances ended, it would be a very conſiderable queſtion before a jury: though a jury always leans to ſupport the marriage in favour of a juſt creditor, when the debt was contracted in name of the huſband and wife: but in ſuch caſe it would be doubtful, though if contracted directly within theſe three months it might be otherwiſe. But the great thing in this caſe is the ſhortneſs of time, in which the cohabitation ſubſiſted. It is impoſſible for me to ſay, the defendant is a married woman notwithſtanding her and her ſuppoſed huſband both denying it on oath, and at the ſame time being liable to proſecution in Eccleſiaſtical court for fornication; againſt which proſecution theſe circumſtances diſcloſed to the court could not protect them as being married. Thoſe circumſtances are certainly proper evidence of the marriage; for on a limitation over in caſe of marriage, if a marriage is had, it is probably clandeſtine; if therefore the court was to ſay, ſuch circumſtances were not evidence, it would be impoſſible to prove it. But both defendants denying it on oath, and inſiſting on trying it, it muſt be tried; for a jury are proper judges of the fact.

Caſe 88. Cowſlade *verſus* Corniſh, *May* 2, 1751.

The party may be examined on new interrogatories without an order, the Maſter being the judge: not ſo of a witneſs without a new order.

MOTION for defendant to ſuppreſs interrogatories as filed irregularly without an order, the defendant having been examined on interrogatories before to the ſame matter; and it is determined, that new interrogatories cannot be exhibited without an order.

LORD CHANCELLOR.

I do not take the practice to be, as inſiſted for defendant, that where there is a general direction in a decree to examine on interrogatories before the Maſter, as the Maſter ſhall direct; if the party has been examined on one ſet, and afterward there ſhould ariſe another matter, on which the Maſter thinks it proper to be examined, it is in the judgment of the Maſter, whether, and what time, and how often, he thinks fit, that the defendant ſhould be examined: nor is a new order neceſſary. It is ſo indeed in caſe of a witneſs; for that is different. If a witneſs is once examined, it might be dangerous without an order to let him be examined again; but that is from the danger of drawing in a witneſs, when it is known, what

what he has already ſworn to: but there is no danger as to the party interrogated, who may be examined *toties quoties* without a new order of court.

Earl of Godolphin *verſus* Penneck, *May* 3, 1751. Caſe 89.

Deviſe that all debts ſhould be firſt paid and ſatisfied: cuſtomary lands, ſurrendered in truſt for ſeveral and for uſe of ſuch as teſtator ſhould appoint, and deviſed in diſtinct parts from the reſt, are ſubject to debts; the firſt diſpoſition running over all.

FRANCIS PENNECK by his will firſt declared, he would make a diſpoſition of his whole eſtate and effects. The firſt diſpoſition was, that all his debts and funeral charges ſhould be firſt paid and ſatisfied: then he deviſes the particular parts of his eſtate ſubject thereto, in ſuch manner as he thought fit, among particular perſons.

The bill was on behalf of the plaintiff and the reſt of the creditors to have a ſatisfaction for their debts out of the real and perſonal eſtate of teſtator.

The queſtion was, whether certain cuſtomary lands held of the manor part of the dutchy of *Cornwall*, which had been mentioned in the will in diſtinct parts from the reſt of the fee-ſimple lands, were ſubject to debts, the teſtator having ſurrendered thoſe lands to *B. Penneck*, who declared a truſt thereof by deed for ſeveral perſons, and for the uſe of ſuch as teſtator ſhould appoint?

See 3 Ves. Jun. 552. where Lord Th. Roſslyn decreed on the authority of this case as his own first impreſſion.

LORD CHANCELLOR.

I am ſatisfied, that by the will theſe lands are ſubject to debts.

As to the original nature of them, whether they would be liable without the act of the tenant to ſubject them to payment of debts, it is not ſufficiently before me. If copyhold, they undoubtedly would not be ſo: but they are not copyhold, becauſe by the ſurrender produced the admittance is to hold according to the cuſtom of the manor, but not according to the will of the lord: therefore they are cuſtomary: whether liable to the payment of debts or not does not appear. There may be inſtances, in which they may, though they paſs by ſurrender and admittance in the Lord's court; and they may not; there being no proof as to that: therefore that original queſtion muſt be laid out of the caſe.

The ſingle queſtion then will reſt on the conſtruction of this will, reſulting from the acts of teſtator antecedent, what he had done to ſubject them, and the conſtruction of that will. As to the acts, he has done ſufficient to ſubject them to any act by his will; for as theſe cuſtomary lands (and ſo of copyhold) are ſubject to have a

truſt declared, whatever acts are done by his will, will affect them: which brings it to the true conſtruction of this will; by which conſtruction all the lands and every part of them deviſed thereby are made ſubject to debts. The rule of law is, and more ſtrongly of this court, that ſuch conſtruction is to be made of wills, as tends to do juſtice to creditors of teſtator, and to attain ſatisfaction of juſt debts as far as poſſible; and for that all wills, eſpecially in this court, have received the moſt liberal conſtruction. Here the firſt diſpoſition runs over all the ſubſequent clauſes in this will. That was the conſtruction made by Lord *King* in *Leigh* v. *The Earl of Warwick*, affirmed in the houſe of *Lords*; though there were ſtrong words againſt its running over the whole: for though teſtator there had uſed theſe general words here, yet afterward in deviſing the particular parts he had deviſed them ſubject to debts, and the queſtion was, whether thoſe other parts not ſo deviſed ſhould be by the firſt clauſe ſubject: and it was determined by that general clauſe to affect the whole notwithſtanding the particular deviſes: that therefore was ſtronger; and in this I am of opinion, the intent was, that every thing, the teſtator gave by his will, ſhould be ſubject to his debts: conſequently the truſt of theſe lands muſt be ſubject as well as the reſt, notwithſtanding theſe are mentioned in diſtinct parts, agreeable to that caſe on the will of ——— *Booth* before Lord *King*.

The moſt liberal conſtruction of wills for creditors.

Note: *Lord Chancellor* ſaid, he took it, that *tenant right* eſtates in the *North*, were ſubject to debts, though he was not ſure of it: and ſome at the bar ſeemed to think otherwiſe.

Caſe 90. Ex parte Matthews, *May* 3, 1751.

LORD CHANCELLOR.

Mortgage of ſhip at ſea.

A mortgage may be made of a ſhip at ſea; and if mortgagee takes all methods in his power to get the poſſeſſion, ſuch as bill of ſale, *&c.* it will be out of the ſtatute *J.* 1. as was held in *Brown* v. *Heathcote*; which caſe was taken notice of by the judges in *Ryal* v. *Rowls*: otherwiſe no ſecurity could be made of a ſhip at ſea. But the ſuffering the ſhip to come back, and go on another voyage, made it a very different caſe from *Brown* v. *Heathcote*.

1746. Ante 27 Jan. 1749-50.

Attorney

Attorney General *verſus* Cock, *May* 4, 1751. Caſe 91.

Maſter of the Rolls pro *Lord Chancellor.*

ANNE PARTRIDGE began her will with giving ſeveral pecuniary legacies, and among others gives to *Philip James*, the miniſter or paſtor at the meeting-houſe at *Marloes*, 50 *l.* abſolutely to his own uſe; then in a different clauſe, "*Item* I give and "bequeath to *William Cock*, his heirs and aſſigns for ever, the pre- "miſes (deſcribing them) chargeable nevertheleſs with an annuity "of 10 *l. per ann.* which I give to the miniſter belonging to the "meeting-houſe at *Marloes* aforeſaid: but if the ſaid houſe at *Mar-* "*loes* ſhould not be uſed as a meeting-houſe after my deceaſe, then "to the miniſter of any other place the proteſtant diſſenters, called "*Baptiſts*, ſhall meet in, provided it be in the pariſh of *Hemel Hemp-* "*ſtead*;" with power to the ſaid miniſter to enter on the premiſes and diſtrain.

Annuity to a miniſter of baptiſts eſtabliſhed as a good charity, like that to quakers, and to go to the ſucceſſor for time being.

Philip James enjoyed the annuity to his death in 1748. The preſent information was at the relation of his ſucceſſor for eſtabliſhment of the charity and continuance of the payment againſt deviſee of the real eſtate charged therewith.

For Relator. This is not intended for the particular perſon then miniſter of the congregation, but in perpetual ſucceſſion as long as that congregation continued. The court cannot ſet it aſide but on foundation of not being a charitable uſe. Whether a charity to a congregation of proteſtant diſſenters is a good or ſuperſtitious charity, has been no queſtion ſince the ſtat. of *William* and *Mary*. In *Lloyd* v. *Spillet* 3 *Wil.* 344. it was not doubted, but that diſſenting miniſters might take. In *Attorney General* v. *Andrews*, 9 *March* 1748. copyhold lands not ſurrendered to uſe of the will were deviſed for benefit of quakers; on a bill *Lord Chancellor* eſtabliſhed it. It is not in caſe of a ſuperſtitious uſe, that the king gives it to another charity of the ſame kind; for whatever is ſufficiently deſcribed, and yet is a bad charity, is not to go to a charity *cy pres*, but to the crown abſolutely; which is not bound to appoint it to any other. That is done only, where the charity is not ſpecifically defined, but it muſt be given to a charity, then the king does it by a privy ſeal. The act of parliament is not merely an act of toleration; it takes off the penalty; reſtoring the common right of mankind to worſhip God according to their own conſcience; and it is agreeable to the policy of inviting people to come to trade and live here, and to the policy of every man's diſpoſing of his own as he pleaſes. Ante.

For defendant. No perſon is intitled but the identical miniſter at making the will and death of teſtatrix, who muſt take *eo nomine* as *deſcriptio perſonæ*, there being nothing in the will that leads to its being perpetual. If ſo intended, ſhe would have ſaid *miniſter for the time being*; but ſuppoſing it ſo, the queſtion is, how far this ſpecies of charity ought to be eſtabliſhed, and whether it can take effect in law? This court, before it interpoſes for a charity, will conſider the nature of it, and not execute every charity, made on religious principles the ſame of which the teſtator was; and where that has been done inadvertently by the teſtator, it has been repented; as Sir *Joſeph Jekyl* did, after he had directed a charity for old maids to be eſtabliſhed, and ordered a rehearing: but that was never had. In *Mendes D'Coſta* v. *D'Pays* 6 *Dec.* 1743 *Elias D'Pays* a Jew, by his will ordered 1200 *l.* to be appropriated for eſtabliſhment of an aſſembly for the reading their holy and divine law for ever: Lord Chancellor held it an illegal charity, ſuch as this court would not inforce; becauſe it was for the propagation of the *Jewiſh law* in contradiction to the chriſtian religion, which has been declared to be part of the law and conſtitution of this kingdom. In *Oakaver's* caſe, though Sir *Joſeph Jekyl* eſtabliſhed the charity for choriſters, *Lord Chancellor* would not do it. In *Attorney General* v. *Eades* 1713. part of a real eſtate was deviſed to the poor of a pariſh, commonly called *Anabaptiſts*; on a bill for eſtabliſhment of it againſt the heir at law, who inſiſted, it was void, Lord *Harcourt* did not incline to think it a good charity, ſaying he was not ſatisfied to eſtabliſh a charity of this kind, as it might be a mean to draw people from the church; that it was one thing to tolerate diſſenters, and another to eſtabliſh a perpetual fund for their ſupport; he would therefore conſider of it, and deſired to be attended with precedents: but it does not appear, what became of that caſe. The act of parliament was not made with a view to create a diviſion, but to give ſome eaſe to ſcrupulous conſciences. It is not an act of encouragement, but of toleration, temporarily to exempt perſons then in being from the penalty of the law, not for the benefit of ſcrupulous conſciences for ever, or to invite people to ſuch a ſeparate congregation. The eſtabliſhment of this would encourage any other ſeparate conventicle, which is regiſtered, as *Henley's*, *Weſtley's*, *&c.* propagate a conſtant ſucceſſion of ſeparatiſts, and the diſſenters might in time come to have more property than thoſe of the church of *England.* The caſes cited come not up to this. *Lloyd* v. *Spillet* (which is neareſt) came firſt before Lord *Talbot*, and twice afterward before Lord *Hardwicke*, and each time received a different determination. *Lord Chancellor* ſaid there, he was going to deliver an opinion concerning the right to an eſtate in his own mind quite contrary to intent of teſtator; though the circumſtances were ſuch, he could not do otherwiſe; ſo that the truſtees had it to their own uſe, and the charity did not come in queſtion. If there was any doubt as to the intent,

one would rather lean to ſtop the progreſs of this evil. It does not ſeem to be eſtabliſhed by any decree. As to ſeminaries this charity would clearly not be good: though it is but ſmall, the ſame rule muſt be made. It is argued, that this would accrue to the crown as an intereſt out of a real eſtate to a ſuperſtitious uſe, and not to the defendant: but the crown takes ſuperſtitious uſes by the ſtatutes of *H.* 8. *E.* 6. and *G.* 1. not by the common law. The ſuperſtitious uſes deſcribed in the two former cannot take in this, which ariſes ſince; and the ſtatute *G.* 1. is confined to popiſh uſes, veſting all ſuch in the crown without office found. This charity being totally void, there is no ground for the crown's ſettling it to a new one; and it will fall into the eſtate for the deviſee.

Sir *John Strange.*

This caſe depends on two points. Firſt whether the relator within the intent of the will is intitled to come into this court, or whether the gift is not extinguiſhed or expired at death of *James*? Next ſuppoſing him to ſtand in the ſame ſituation as *James* himſelf, whether the charity is of ſuch a nature, as is proper for this court to countenance or eſtabliſh?

Conſidering the whole frame of the will, the plain intent of teſtatrix was not to confine it to the perſon then miniſter, but to go upon his death or vacancy to whoever ſhould be his ſucceſſor from time to time. The interpretation of the deviſe in fee to *Cock* is, that, as he is to have it to him and his heirs for ever, it ſhould be chargeable in the hands of him and his heirs for ever with this ſum payable in manner aftermentioned. Then what is there to reſtrain theſe words to the particular perſon named before? She had compleated all the benefit perſonally deſigned to *James*, not conſidering him as the perſon in all events intitled to this, as he might remove to another place. She had given him 50 *l.* abſolutely, and does not ſay, *I give to the ſaid miniſter*; which might be urged perſonally to refer to him: though I ſhould have no doubt, even if it had been ſo. The word aforeſaid cannot run back; for all the reference thereof is only to the houſe called *Marloes.* She plainly intended, this ſhould have a continuation, having provided for the particular accident that did happen, that they might be ejected from the houſe called *Marloes*, and be forced to aſſemble in another place in that pariſh. The relator therefore, ſuppoſing it a good charitable uſe, is intitled to the benefit of this; for I muſt conſtrue it to mean a miniſter for the time being.

As to the charity itſelf, whether it is ſuch, as this court would think reaſonable to aid in order to carry into execution, it ſeems on the authorities cited, that this is not now to be made a queſtion; for

not

not only that case of the quakers; but that cited for defendant of the Jews, ſeem ſtrong in ſupport of this. The baptiſts are perſons, the legiſlature have thought proper ſo far to countenance as a denomination of chriſtians as to extend the toleration to them, ſtanding on the ſame foot as quakers, another ſpecies of diſſenters: if therefore the court has eſtabliſhed it in caſe of a proviſion for quakers, no reaſon why a difficulty ſhould be made to give this kind of diſſenters the benefit of this proviſion. In the quakers caſe the court went a great way, not only countenancing it as a good charitable uſe, but ſupplying the want of ſurrender to the uſe of the will. *D'Coſta* v. *D'Pays* went on this; *Lord Chancellor* refuſed to carry it into execution, becauſe it was not for the ſupport or encouragement of any denomination of chriſtians whatever; for had it been ſo, he ſeems for the reaſons given by him to be of opinion, that it ought to be eſtabliſhed. I own, I was ſurpriſed, there have been no other caſes in relation to this; which may be from its not being doubted ſince the act of toleration, whether this ſort of people are not to be conſidered as intitled to the aid and aſſiſtance of this court, as to what relates to their own worſhip and religion, as much as other people. It is ſaid, the act was not deſigned to have continuance, but only for the ſcrupulous conſciences then in being: but that is not the conſtruction ever put upon it. There are few now, who were then in being: yet have they the benefit of that act. I cannot therefore narrow it to that. It is ſomewhat material, that the late *Mortmain* act has made no diſtinction between one ſet of people and another: but however this charity and the death of teſtatrix was long before the *Mortmain* act; and therefore not affected by the queſtion made, where the teſtator died after the act, and the will made before, which, it has been determined, ſhould take place. I do not think myſelf at liberty to conſider this queſtion quite at large, but as a matter over which the court has ſo far exerciſed its ſuperintendency already.

Baptiſts on ſame foot as Quakers.

Charity to Jews not eſtabliſhed.

Act of toleration not merely for thoſe then in being.

Aſhburnham v. Kirkall cited ante in Attorney General v. Lloyd 1 Aug. 1747.

The relator therefore is intitled to the arrears of the annuity, and a decree for eſtabliſhment of the charity for the payment for the time to come, and to his coſts.

Caſe 92. Pinnel *verſus* Hallet, *May* 11, 1751.

LORD CHANCELLOR.

Houſes purchaſed in *London* cannot be ſaid to be a ſatisfaction of a covenant in marriage-articles: ſo held by Lord *King* of a houſe purchaſed in *London* by old *Peter Courtney*. Farm-houſes, &c. which go along with the eſtate, may be a ſatisfaction; but houſes in

Houſes in London not, as farm-houſes, &c. a ſatisfaction of a covenant in accidents.

in *London* are conſidered as ſubject to accidents, and therefore leſs is given for them at firſt.

The rule, the maſter is to go by in computing the annual value of an eſtate, is, what is the reaſonable computation of the particular value thereof: not by the rule of accident or contingency, by which the value of lands may have greatly fallen, as ſuppoſe from ſome calamity, among the cattle, *&c.* Annual value how computed.

Boon *verſus* Cornforth, *May* 13, 1751. Caſe 93.

THOMAS BOON an *Eaſt India* captain, having only one natural daughter married to defendant, by his will gives 6000 *l.* South-Sea ſtock to *Richard Dyer* "on the truſt herein after mentioned; that he ſhall from time to time during the life of my "dear daughter employ and diſpoſe of all the intereſt and produce "ariſing from thence to and for the ſole and ſeparate uſe of her, "and not of her huſband *Cornforth*, but to be paid into her hands, "and her receipts to be a ſufficient diſcharge; and notwithſtanding "my care of my ſaid daughter my intent is, that ſhe live and coha-"bit with her ſaid huſband; and from and after her deceaſe on "further truſt to diſpoſe of the ſaid 6000 *l.* and intereſt and di-"vidends from thence to and between her huſband *Cornforth* and "my daughter's child and children; *viz.* her huſband ſhall have "and enjoy one half of the intereſt thereof for and during his natu-"ral life, if there ſhould be no child or children, (*which laſt words "were interlined*) and the child or children the other half; on his "death his half ſhall go to the child or children; but till the "child or children attain twenty-one, the huſband ſhall have the "whole intereſt, and on the death of their father they ſhall have "the remaining 3000 *l.* but if no ſuch child or children at the time "of her death, or they ſhall die before twenty-one, then to go on "further truſt as I ſhall hereafter mention." In another part of his will, "*Item* I give to *Richard Dyer*, his heirs and aſſigns, on "further truſt the above 6000 *l.* after death of the aforeſaid *Corn-"forth* and his wife and all the children before coming of age, pro-"vided thoſe children die without iſſue." Nothing was ſaid in this place, what that further truſt ſhould be: but afterward he gives to his daughter and the aforeſaid *Dyer*, their heirs and aſſigns, "my "2000 *l.* ſtock, which ſhall always remain in my name, and other "ſtock, which ſhall alſo remain in my name, and alſo all jewels, "reſt, reſidue, and remainder, which ſhall be turned into money and "made ſtock, on truſt nevertheleſs that *Richard Dyer* and my "daughter, their heirs and aſſigns, ſo far as concerns her truſt, ſhall "diſpoſe of all the intereſt of the 6000 *l.* and other ſtock, to my "nephew *Daniel Boon*." In another clauſe, "*Item*, I give to my

" ſaid daughter the equal poſſeſſion and ſight for life to live at *Lee*
" place, where I now live, with her huſband, to have the uſe of the
" houſe, plate, linen, and every thing elſe as her occaſions ſhall re-
" quire, as alſo ſtabling and fields, and not to be ſubject to be turned
" out by the family of *Boon* or any one elſe notwithſtanding the in-
" tail, I am going to make; and that all my goods, furniture, plate,
" books, pictures, and every thing elſe which at my deceaſe ſhall be
" at my houſe at *Lee*, ſhall remain there, and be enjoyed by the
" perſon, who for the time being ſhall be in poſſeſſion of the ſaid
" houſe. *Item* I give and deviſe all that capital meſſuage called
" *Lee* place, and all thoſe three pieces of grounds in *Lee* which I
" lately bought of *H. C.* and other tenements (deſcribing them) and
" the little houſe at *Lee*, to *Richard Dyer* and his heirs in truſt for
" my daughter for life without impeachment of waſte, and from
" and after her deceaſe as well the ſaid little houſe, meſſuage, and
" tenement, ſo limited to her for life, as all other lands, tenements,
" and hereditaments, with their appurtenances, in truſt for my ne-
" phew *Daniel Boon* for life," with remainders over to all his ne-
phews and the iſſue of thoſe nephews. There was a clauſe in the will, that his nephews ſhould not ſell or diſpoſe of any of thoſe heir-looms, but that they ſhould go with the houſe as far as the law would admit of.

It having been ſuggeſted, that this was one of three wills, liberty was given to apply to the prerogative court; and accordingly a probate was granted of that, which was the original will, by which there appeared to be ſome interlineations. All the queſtions aroſe on this will. Firſt as to the perſonal eſtate, as to the 6000 *l.* and the particular goods and chattels compriſed under the bequeſt of the things at *Lee* to the daughter. Then as to the real eſtate, whether thoſe three fields paſs with the uſe and occupation of the houſe to her; and whether ſhe took an eſtate for life in the reſidue and bulk of his real eſtate by implication, before ſuch time as the eſtate is limited to Mr. *Boon*?

LORD CHANCELLOR.

I have in the beſt manner, I could, conſidered the will: but of all the wills ever under my conſideration it is in many parts the moſt inconſiſtent, repugnant, and the moſt difficult to make common ſenſe of, that I ever met with, all the queſtions being occaſioned by the ſtrange inconſiſtent penning.

Repugnant words in a will may be rejected or tranſpoſed.

The firſt on the perſonal eſtate depends on ſeveral parts of the will, the further truſt referred to as to the 6000 *l.* being in another part, and muſt ſtill be taken from the ſubſequent clauſe, which is a diſpoſition of the whole reſidue of perſonal eſtate of teſtator, who in making

making his daughter a co-truſtee of that ſurplus (which might be a continuing truſt) did not mean to make her truſtee as to the 6000 *l.* of which ſhe was to have the beneficial intereſt during life. After her deceaſe her huſband, if ſhe leaves children, is clearly intitled to one moiety during life, and to the other till all the children attain twenty-one: but if ſhe left no children, the queſtion is, whether he is to take any intereſt in thoſe dividends during life, or whether they go to *Boon* and his children by the bequeſt over? I am of opinion, on the beſt conſtruction I can make of this very odd will, that he will be intitled to all the dividends of this during his life. Firſt conſider, as it ſtood before the alteration by the interlineation (as appears by the probate) of thoſe words, which makes the nonſenſe and contradiction of the firſt clauſe, *viz. if there ſhould be no child or children!* Clearly as it ſtood at firſt, if ſhe left children, he would be intitled to half during life, and to the other half till the attaining twenty-one or death: if no children, and he ſurvived her, it was to go to *Boon* the reſiduary legatee of all his perſonal eſtate, but after death of *Cornforth* and his wife; which was a plain and neceſſary implication, that he was to take the dividend of this whole ſtock in that caſe. This is ſtrengthened from the conſideration of the circumſtances of the parties; for teſtator could not mean to give him a leſs intereſt if no children, and it was to go to a collateral relation, than he meant to do, if ſhe left children, to the prejudice of thoſe children; *Cornforth* being to have it till they attained twenty-one. If that is the conſtruction, then next conſider what effect the inſertion of thoſe words will have. Reading them with the other part, they are entirely inconſiſtent and repugnant; ſomething therefore muſt be rejected, as no ſenſe can be made of it; for if there are contradictory words in a will, which cannot be reconciled, ſome muſt be rejected. Which ought I to reject, the words interlined or the entire proviſion? They crept in by chance; and on this will there is a ſtronger foundation than in moſt caſes for rejecting them; becauſe it appears by the probate, how this interlineation came in, that it aroſe from the teſtator's not attending to it, that in the draught of his will there was a compleat proviſion made before for that caſe. It is a rule in law by *Holt* C. J. in *Cole* v. *Rawlinſon*, that words in a will may be rejected or tranſpoſed, if nonſenſical. Theſe words are twice written in this will; once by miſtake; it is natural therefore to tranſpoſe thoſe words to the proper place, where they are ſenſible and not repugnant, and to conſtrue them as if wrote but once.

2 Lord Ra. 1 Sal.

Next as to the goods and things at *Lee*; which ariſes on two clauſes in the will. It was taken at the bar, that theſe two clauſes were co-extenſive as to the words every thing elſe: but they are not ſo. Theſe things expreſsly enumerated will clearly paſs to the daughter. Pictures put up in a houſe are conſidered as part of the furniture; and ſo his houſhold-linen: but a queſtion ariſes, as to proviſions

Every thing elſe at my houſe means of the ſame kind, proper to go with the houſe as heir-looms, viz. fixtures and ornaments.

As occaſions ſhall reqnire will take in proviſions for man or horſe there.

proviſions of any kind either for the houſe or ſtable, as liquors, corn, hay, *&c.* and ſome curioſities he had in his houſe, *China*, *Japan*, *India* pieces for handkerchiefs, watches, and a cane, whether theſe paſs by either and which of thoſe clauſes? Taking it on the laſt clauſe, which makes them heirlooms, *every thing elſe, which at my deceaſe ſhall be at my houſe*, muſt be conſtrued things *ejuſdem generis*, ſuch as are proper to go with the houſe as heirlooms; and that the cane, watches, and *India* pieces not made up, cannot paſs as heirlooms; much leſs the liquors, hay, *&c.* for it means things fixed to the freehold, the *China*, and every thing of that kind ſet up by way of ornament, and to have continuance along with it, and not conſumable as thoſe things are. But on the firſt clauſe the queſtion is, what the daughter ſhall enjoy? There, the conſtruction goes farther, taking in ſufficiently corn, hay, and proviſions in the houſe, for it means her occaſions of reſiding and living there, not any occaſions whatever, and will take in all kind of proviſion for man or horſe in the houſe or ſtable: but thoſe things, which paſs not as heirlooms, fall into the reſidue of the perſonal eſtate.

As to the three fields, he meant to paſs the uſe and occupation of the ſame to his daughter in the firſt clauſe, though it is general, that he has given in the latter: it is inaccurate, and the penning different, but he meant them co-extenſive.

Eſtate for life by implication, as on deviſe to heir after death of another, depends on the intent by circumſtances.

Vau. 259.

As to the bulk of the real eſtate (how much does not appear, nor is it material) I am of opinion, upon the conſtruction of the whole of this ſtrange will, the daughter does not take an eſtate for life by implication; and it plainly was not intended. It is inſiſted, that according to the caſe 13 *H.* 7. and other caſes, where there is a deviſe to an heir at law after the death of the wife or any other perſon, there is a deviſe to the wife or that other perſon by implication; it ſhewing the heir at law ſhould not take it, and that the land cannot be in abeyance; and that here is a deviſe after death of the daughter of all other lands to *Boon*, who is heir at law. That is the general rule; ſo held in *Gardner* v. *Sheldon*, with ſeveral refined diſtinctions put by *Vaughan*: but all thoſe caſes depend on and ariſe from circumſtances indicating the intent of the teſtator, and that is not the intent of teſtator here. *Vaughan* ſays, it is a vain, idle, diſtinction, (and I am of opinion with him in that) and that where another thing is given by expreſs words to a deviſee, yet he ſhould not take a different thing by implication: but it is another queſtion, where it is the ſame or part of the ſame thing. Here teſtator has given to his daughter the uſe and occupation of this houſe; and *Lee* place is the very firſt thing deviſed by this clauſe, under which the deviſe by implication is contended for. It is not to be thought, he intended to give her the uſe and occupation of this houſe for life, and afterward the eſtate to be left for her by implication. But it is ſtronger from

the other words; if he intended to give the family of *Boon* nothing but a remainder of this houſe and the reſt of the eſtate after the daughter's death, he could not think, ſhe would be liable to be turned out. His meaning was this; he was going to deviſe this houſe and the reſt to *Boon* and his family in poſſeſſion, which would give the legal eſtate, and make her liable to be turned out; he therefore directed the poſſeſſion of this houſe to her for life, and that they ſhould not turn her out. This is diſtinct from all the caſes put by *Vaughan*; which by the way are done by him in a very odd manner; for he puts caſes, and anſwers them by making thoſe caſes different by adding to them. But I will mention this in general, that that caſe is to be taken *cum grano ſalis* throughout; and there is a plain opinion of *Vaughan* put at the end of that caſe directly contrary to law, and ſo held ever ſince, *viz.* as to an executory deviſe after a general dying without iſſue. But there is one obſervation plainly ſhewing, the teſtator did not intend the daughter ſhould have any eſtate by implication by this deviſe, *viz.* the clauſe creating the heir-looms; where the perſons, he declares, ſhall be reſtrained from diſpoſing of any of them, are all thoſe, whom he makes tenants for life of this houſe and other parts of his eſtate: it is impoſſible, if he intended to make his daughter tenant for life of this houſe, lands, and tenements, that he ſhould not name her among thoſe perſons, he makes tenants for life. The queſtion then is, whether the words will bear this conſtruction? They plainly do, being to be conſtrued diſtributively *reddendo ſingula ſingulis* like the diſtribution of words in marriage-ſettlements. The point contended for the defendant being only a deviſe by implication, and there being all this in the will to rebut that, it is impoſſible. This obſervation diſtinguiſhes this from all the caſes cited in *Gardner* v. *Sheldon*; for there it was impoſſible to make that conſtruction; no diſtribution could be made to imply part of the eſtate in poſſeſſion, and the other part in remainder; it was neceſſary there to make a conſtruction of the whole. The reſt of the real eſtate therefore is given to Mr. *Boon* with remainders over.

Taylour *verſus* Rochfort, *May* 18, 1751. Caſe 94.

At the Exchequer.

BILL to ſet aſide a bill of ſale of plaintiff's prize-money, made for 150*l.* and a ſubſequent agreement confirming it. The original ſale was to Dr. *Jenniſon*, a phyſician at the place to which the prize was brought in, and where the plaintiff was then ſick. The ſecond agreement recited the bill of ſale for 150*l. ſterling*; then recited that a bill in *Chancery* had been filed to ſet it aſide, which, the plaintiff agreed, ſhould be diſmiſſed with coſts; and in conſideration

Confirmation of ſailor's ſhare of prize-money ſet aſide.

The manager decreed to account with allowance for what remitted.

ration of 60*l.* paid or ſecured to be paid, the plaintiff confirms and eſtabliſhes the bill of ſale, and renounces all claim on account of the prize or other demands, and all ſuits in law or equity. Mr. *Fitzgerald*, a defendant, the ſame day gave his note to pay the 60*l.* out of the ſecond dividend.

Poſt, How v. Edwards, 17 June 1754.

For plaintiff. This caſe is within the rule of *Brown* v. *Foley*, that no phyſician or chirurgeon ſhould buy a ſailor's ſhare of a prize; many of which ſales have been ſet aſide; particularly in *Baldwin* v. *Rochfort*, 11 *November* 1748, againſt the preſent defendants, by Lord *Hardwicke*, who ſaid, the point, on which caſes of this kind muſt be determined, is fraud from the circumſtances and value of the thing parted with; that they are within the rule of *poſt obits*, and marriage brocage-bonds, and ſtronger from the publick inconvenience as being in the caſe of ſailors, and that the rule of the civil law in ſetting aſide bargains for leſs than half value was of weight; all which arguments hold here; as alſo the inequality of circumſtances of the parties, the poverty of the plaintiff, miſrepreſentation, and threats on him; all theſe caſes muſt be determined on the circumſtances; and a court of equity will not lay down rules, for then people will endeavour to evade them. The ſecond agreement is as fraudulent as the former ſale; has all the marks of fraud, and of double hatching, as Lord *Cowper* phraſes; is within the act of parliament 20 *G.* 2. *c.* 24. and is a continuation of the former fraud. *Wiſeman* v. *Beake*, 2 *Ver.* 121. That an account may alſo be directed againſt Mr. *Fitzgerald*, who has received part, appears from a late caſe, where the bill was to ſet aſide a conveyance againſt Mr. *Copinger* the purchaſer, who reſided in *Ireland*, and againſt Mr. *Winthorp* the agent here, who received money on account of *Copinger*; the late *Maſter of the Rolls* made a decree againſt all the defendants, that they ſhould account; *Winthorp* appealed, as being charged with 400*l.* which, he ſaid, he had remitted to *Copinger*. *Lord Chancellor* 16 *March* 1749. affirmed the decree with this variation, he firſt ordered an inquiry whether *Winthorp* had paid any thing out of the ſum, and how the account ſtood between him and *Copinger*, and ſo far as he had remitted, that he ſhould have an allowance. In like manner ſhould the account be againſt *Fitzgerald*.

For defendants. Though ſeveral caſes have been determined on general contracts for purchaſe of ſeamen's ſhares, ſo that it is too much to ſay, the original (though made by another from whom defendants purchaſed) can be ſupported; yet this is in a different light upon the ſecond contract, upon which only defendants inſiſt; and if fairly made, it ought not to be ſet aſide in equity upon inequality. Any injury, and any right to ſatisfaction for it, whether by violence or fraud, may be compounded, on whatever terms the parties pleaſe, if truly conuſant, and no ſuppreſſion of truth, or ſuggeſtion

geſtion of falſehood; and though a prejudice enſues to one ſide, and the right appears afterward clear, there is no foundation to ſet it aſide. The determination of a cauſe is always a foundation for compoſition (as *Lord Chancellor* has often ſaid) let the event be, what it would. This is the rule of courts of law and equity both. The law will ſuppoſe a doubt, when a ſuit is depending. The words of Lord *Macclesfield* in *Cann* v. *Cann*, 1 *Will.* 724. were repeated by Lord *Hardwick* in *Stapilton* v. *Stapilton*, 2 *Auguſt* 1739. where two brothers, one born before marriage the other after, were bred up in the father's family, the eldeſt taken to be legitimate; after their coming of age the father to accommodate and have a ſettlement made, agreed with his family; this was afterward not acquieſced in; and the elder was found a baſtard: *Lord Chancellor* mentioning the foundation of all compromiſes, would not ſet aſide the agreement. So *Cole* v. *Gibbons*, 3 *Will.* 290. though a bad agreement. In *Lord Cheſterfield* v. *Janſſen* the whole court ſaid, the contract, whether it was bad before or not, was made good by the confirmation. At the time of purchaſe of theſe ſhares it was not known, what they would be; which is the only way of judging, and not *ex poſt facto* that it was at under value. In the opinion of ſeveral, theſe contracts were good; becauſe there was ſome hazard, and it could not be known, what would be the determination in a court of equity. The legal property by theſe aſſignments was transferred over, and an action lay in a court of law for money had and received; and there had been ſeveral recoveries at law on theſe aſſignments: though courts of equity have ſince held, that the plaintiff had ſo ſtrong an equity as to overturn the rule of law, that was not then known. Ante 4 Feb. 1750-1.

The whole *court* were of opinion to give plaintiff relief. The caſe has been argued, as if the court could not now conſider the original agreement: yet they muſt in order to ſee, whether plaintiff was fully appriſed of his right at the time of the ſecond, and further becauſe this is a bill to ſet aſide both. *Jenniſon* acted as an agent for the other defendants, who waited like harpies and land-ſharks to draw this poor ſailor into this agreement, for what was worth 400*l.* though not then known to be ſo. The ſecond agreement is as bad as the firſt. There is ſuggeſtion of falſhood in it; for it recites the bill of ſale to be for 150*l. ſterling*, whereas in fact only 150*l. Iriſh* currency was paid; which was done with a fraudulent purpoſe. *Sterling*, though contracted for in *Ireland*, would in common parlance be underſtood *Engliſh* money, and cannot be intended *Iriſh* currency. The diſmiſſing the bill in *Chancery* with coſts was leaving plaintiff at the mercy of defendants, and to be conſidered as uſing a court of equity as a ſtalking horſe to juſtify ſuch a tranſaction, as was in *Wiſeman* v. *Beak*. Nothing is paid down to plaintiff; nor even an abſolute ſecurity for payment of the 60*l.* but a mere

Sterling means Engliſh currency.

mere contingency given for this releaſe; for if nothing is ever received on the ſecond dividend, *Fitzgerald* would not be obliged by this note to pay; ſo that the conſideration departed from the agreement. It is plainly proved, that means were uſed by imaginary terrors and miſrepreſentations to induce plaintiff to come into it. It is true, as according to the caſes cited, that a compromiſe of a doubtful right is ſufficient foundation for an agreement, eſpecially where a cauſe is ended by it; and that where a plaintiff is fully appriſed of his right, and underſtands what he does, he may compound a demand on what terms he will, and ſo may accept of the compoſition out of the fund, that is even in queſtion in the cauſe; nor will inequality be a reaſon to ſet it aſide here: for if men, who are free agents, will with open eyes ratify unfair agreements, this court will not relieve fools. All, that *Janſſen*'s caſe proves, is, that however the original was, the ſubſequent confirmation, when fully appriſed, made it good. The rule of the civil law agrees with this, that deeds fairly made according to *Cann* v. *Cann*, are not lightly to be ſet aſide: but their courts are more eaſy in reſcinding agreements than ours: for if a purchaſe is made for leſs than half, though ever ſo fair, the mere inequality is in the civil law ſufficient to reſcind it: but not ſo here. *Domat* indeed ſays, that a compromiſe for a fourth part ſhall not be reſcinded, though half would be ſufficient to ſet aſide an original purchaſe; ſo that, it is ſaid, compromiſes are in the civil law looked on as more ſanctified than original acts: but it is no rule of that law, that compromiſes are of ſuch a nature as to ſtand, however fraudulently made. If fraudulent, they ſhould be broke through, though made over and over: and all the circumſtances, upon which equity relieves in caſe of fraud, as ignorance, poverty of plaintiff, *&c.* concur here: ſo that plaintiff muſt be relieved, and have coſts againſt the defendants, who claiming the beneficial intereſt of this releaſe, muſt be ſubject to a general account. But as to *Jenniſon*, the original contriver, as nothing can be prayed againſt him, (and a perſon ſhould not be brought before the court merely to pray coſts againſt him, as held by *Lord Chancellor* in *Coton* v. *Luttrel*) the bill muſt be diſmiſſed, but without coſts. Againſt *Fitzgerald*, who ſays, he has remitted 300*l.* to the defendants, an account muſt be directed, agreeable to what *Lord Chancellor* did in the caſe cited.

Compoſition, if fair, &c. not ſet aſide for inequality; though ſo by the civil law, if leſs than half.

None to be made defendant only to pray coſts.

Cited ante in Dixon v. Parker.

Parker Chief Baron ſaid, this agreement ſhould be ſet aſide without the aid of the act 20 *G.* 2. for he had ſome doubt, whether this caſe was within it, as it ſeemed to relate to ſubſequent agreements, not intending to avoid payments by the managers before the act; therefore he inclined, that the act would not be ſufficient, if it reſted ſolely on that; though as it ſhewed the ſenſe of the legiſlature, it might be of weight.

Jackſon

Jackſon *verſus* Kelly, *Trinity Term* 1751. Caſe 95.

Lapſed legacy.

Teſtator gives perſonal eſtate in fifths, and appoints A. heir to whatever part of his eſtate ſhould be unappropriated by his will: one of the five was dead at making the will. It goes to A. Reſiduary clauſes take in every thing not mentioned or not effectually given.

JOHN JACKSON began his will with a clauſe, which ſhewed an intent to diſpoſe of his whole perſonal eſtate; afterward he gives ſeveral legacies; and then the remaining part of his fortune, the before mentioned appointments being all diſcharged, he gives in fifths; in caſe of the death of either of his ſiſters before the receipt of her fifth, the ſurviving ſiſter being unmarried ſhould be intitled thereto; and then he appoints his brother heir to whatever part of his eſtate, ſhould be unappropriated by his will.

One of the five reſiduary legatees was in fact dead at the time of making the will.

It was inſiſted, that the ſubſequent words were not ſufficient to carry the lapſed legacy to the brother.

LORD CHANCELLOR.

I am clearly of opinion, that they are ſufficient. This is an attempt to make a teſtator die inteſtate as to ſome part of his perſonal eſtate, who meant in all events to die teſtate as to the whole. As to the word *heir*, in the civil law and all thoſe countries where it is received, the word *heir* is applied to both real and perſonal; and if a man makes a will, "I make *A.* my heir of my eſtate", I ſhould think, that would be ſufficient to carry the perſonal eſtate to well as real, unleſs ſomething elſe in the will ſhould take off the force of that word: but in a will made merely to perſonal eſtate, as this is, and the word *eſtate* is uſed generally, the intent is to make him univerſal heir. Next on the word *unappropriated*, whether this becomes a lapſed legacy by dying in life of teſtator? It is not contended, that it was not in point of law, fact, and conſequence, unappropriated; for it was more ſtrongly ſo, than if the legatee had been living at time of making the will; in which caſe there would be more colour to ſay this: but being dead at that time, nothing was given at all. The conſtruction of all theſe clauſes is as to perſonal eſtate, that ſuch reſiduary deviſe takes in every thing, that is not mentioned to be given, or not effectually given. It is a ſweeping clauſe, taking in the whole which is not diſpoſed of, from whatever contingency it ariſes, notwithſtanding the words "all the "reſidue of my eſtate not *before* diſpoſed of." Where indeed a man gives the reſidue to ſeveral, equally to be divided ſo as to make them tenants in common, without giving it over, and one of them died in his life, it has been held, that his ſhare will be ſomething undiſpoſed of, and go according to the rule of the ſtatute of diſtri-

bution among the next of kin, becauſe nothing is given to any of the ſurviving legatees but a 4th or a fifth according to the caſe. There is another matter, on which this might have operated; for ſuppoſe one of theſe ſiſters intitled to a fifth had died in life of teſtator, and the ſurviving ſiſter had been married, ſo that ſhe was not the perſon deſcribed, not having the qualification; upon the laſt bequeſt, on which this queſtion ariſes, the ſhare of the deceaſed ſiſter would have gone to the brother; that being the conſtant rule of reſiduary clauſes to take the whole undiſpoſed of; and this appears to be teſtator's intent. As to real eſtate indeed in *Goodright* v. *Opey*, † and in *Wright* v. *Horn*, *C. B.* ‡ there was a difference of opinion: but that ariſes from the nature of real eſtates: but as to perſonal this never was diſputed.

† 1. L. P. Mod. 123. ‡ 8. L. P. Mod. 221.

Difference as to real and perſonal eſtate.

Caſe 96. Attorney General *verſus* Dupleſſis.

At the Exchequer.

THE late Lord *Colerain* deviſed, that from his death till his daughter *Roſa Peregrina* attained twenty-one, or married with conſent of her mother, the mother ſhould receive all the rents and profits from all his lands in *Middleſex* and *Norfolk*, with directions to pay 300 *l. per ann.* to the daughter, and to take 900 *l. per ann.* to herſelf, and to account with the daughter if ſhe attained twenty-one or married; if the daughter died before either, then over.

Waſte.

Alien.

Information on behalf of the crown upon ſuggeſtion of being alien; and motion for injunction to ſtay waſte.

On ſhewing cauſe it was ſaid, the crown had now no eſtate whatever till office found; *Page*'s caſe 5 *Co.* 52. for that fact muſt be found by the oaths of 12 men. If it is ſaid, that though nothing is veſted, yet there is a truſt for the crown; it is not ſuch a truſt, as this court can decree. If an alien and natural born ſubject purchaſe land, there is no truſt for the crown; and therefore if office is not found, ſurvivorſhip takes place; the king cannot be a jointenant. This then is not ſuch a truſt, over which a court of equity exerciſes juriſdiction. The freehold is deſcended to the heir at law; and the infant takes only a contingent intereſt; the intermediate profits are in the mother for another; and, whether an alien or no, the crown can have no right to them; for that is only a contingent intereſt, which may be taken by an alien, 4 *Leon.* An alien is capable of being an adminiſtrator, *Cr. C.* 8, 9. As to waſte, courts of equity have not gone farther, than the law will do; unleſs where there is an intermediate eſtate for life between the firſt tenant for life and the inheritance, which being a particular miſchief omitted in the ſtatute, this court will provide for it. There is no proof of this defendant being

ing an alien; for the pariſh regiſter will not be admitted as evidence of it, becauſe this is to a collateral matter; this court ſtrictly adheres to that, as it did in the caſe of tithes.

For the motion. The general queſtion is, whether, where the crown has a right, on foundation of an alien-purchaſer, this court will ſuffer any one, who gets into poſſeſſion, to deſtroy that eſtate before the crown's final right is determined, when an office cannot be found without aſſiſtance of this court to bring it properly before a jury? The will does not indeed give any immediate eſtate directly in poſſeſſion to the infant, but only a contingency. The mother's intereſt is of a term for years, till the infant attains twenty-one, having a right to the profits till then as in *Boraſton*'s caſe, 3 *Co.* 19. That intereſt will not be a foundation to deſtroy the thing; to prevent which this court will interpoſe, as it does to prevent deſtruction of the thing in queſtion pending ſuit in law or equity; which is the ground of appointing a perpetual receiver, where there is a probability that a court of equity will determine it finally: as in a bill by creditors againſt an heir at law where the court ſees, the eſtate may poſſibly come out to be deficient. So in a bill againſt executor to prevent waſting aſſets. So in a doubt in Eccleſiaſtical court who is executor, as in *Powis* v. *Andrews*, where Lord *Macclesfield* interpoſed notwithſtanding a right at law by the probate obtained. So will this court on a bill againſt one, who has got treaſure *trove*, injoin him from deſtroying it. On the ſame foundation are all the bills to ſtay waſte; and even for a contingent intereſt; as * *Litton* v. *Robinſon*, and *Fleming* v. *Fleming*; and for an infant *in ventre*, in whom no right veſted, and only a mere poſſibility. But this is not a mere poſſibility, but a right in the crown; for an alien may purchaſe for benefit of the crown. *Co. Lit.* That right and title is clear, though it muſt be found by office, becauſe there muſt be a record of it, 5 *Co.* 52. like the caſe of a diſſeiſee, who has a right, though not poſſeſſion. The crown wants the aſſiſtance of this court by evidence to lay before a jury. The mother will be bound to anſwer the queſtion, where the child was born, being not a diſcovery of an illegal act; and probability is a ſufficient ground to interpoſe to prevent deſtruction of the thing.

* Ante cited in Gurth v. Cotton.

The court took time to conſider of it.

Note: A demurrer was put in, which was in *February* 1752 over-ruled by the court; and that judgment affirmed on appeal to the Houſe of Lords.

The

Case 97. The King *verſus* Cotton, *Trinity Term* 1751.

1. C. Parker. Exch. Rep. 112.

At the Exchequer.

Parker Chief Baron, *Clive*, *Legge*, *Smyth*, Barons.

DEMURRER by Attorney General to plea of defendant to an inquiſition upon an extent.

The general queſtion was, whether the goods in the inquiſition were legally ſeiſed into the king's hands, which had been two days before diſtrained for rent?

2d Argument.

Attorney General. It is ſaid, that defendant the landlord, who diſtrained, intended to ſell the premiſes, as ſoon as the five days expired, if they had not been ſeiſed by the inquiſition before: but that intent cannot take it out of the general rule, if not in fact ſold: which as they were not, and could not till the end of the five days, that is out of the caſe. The whole is to be determined on two things. Firſt that by prerogative, veſted in the crown for the publick good, the king is preferable in point of execution for debts, and may take the property of a debtor in execution, till that property is altered by ſome act of the debtor. Next that in fact the property of the goods diſtrained was not altered. If the firſt propoſition is right it is to be conſidered whether there is any exception in favour of diſtreſs to take it out of that rule. There is no doubt of the prerogative giving the crown this advantage in recovering its property; but whether that extends to the preſent caſe. The ſtatute 33 *H.* 8. *c.* 39. eſtabliſhed this prerogative; and in *Attorney General* v. *Andrews*, *Hard.* 23. is laid down to be a ſtatute made by way of abridgement of the royal prerogative; and judgment was given for defendant there becauſe it was out of the ſtatute; which ſhews, what the common law was, and what the ſtatute has done. It is now clear, that an extent for debt of the crown ſhall take in execution any goods whatever, that have been ſeiſed for a third perſon, if that ſeiſure alters not the property. The taking goods by *fieri facias* veſts not the property either in the ſheriff or plaintiff, nor is any property altered, unleſs there is a ſale. So on recogniſance or ſtatute ſtaple the property is not altered by the taking in execution, not till there comes a *liberate*: it remains, where it was, yet in *cuſtodia legis*. So in a commiſſion of bankruptcy, the property is out of the party by a retroſpect on aſſignment, yet till actual aſſignment no property is altered out of the bankrupt himſelf: till when in all theſe caſes the crown's prerogative takes effect, and the extent ſhall prevail. *Stringfellow*'s caſe, *Dy.* 67. *b.* *Hob.* 339. 2 *Rob. Ab.* 158. ſhews, that till the property altered, the crown's execution, though ſubſequent, is not prevented;

Diſtreſs for rent by landlord may be ſeiſed for king's debt before ſale.

vented; nor is it by the goods being in cuſtody of the law. *Fitz. Execution, Placito* 38. ſhews this prerogative. A commiſſion of bankruptcy, though not an execution in formality of law, yet is to anſwer the ſame general effect; it is to ſecure the bankrupts property: yet the crown's execution coming before actual aſſignment, even though the ſame day with the aſſignment, is preferred. The commiſſioners of the land-tax have by virtue of a power to them, a right to iſſue a warrant to ſeiſe the goods, effects, and eſtate of one, debtor to the crown by that act: they did ſo in *Bracy* v. *Dawſon*, *B. R.* in Lord *Hardwicke*'s time; but the warrant was dated the ſame day, when a commiſſion had iſſued before againſt him as a bankrupt, and the aſſignment made the morning of that day: upon a queſtion whether the aſſignees or the crown were intitled to the benefit of theſe goods, the court held, the warrant ſtood on the ſame ground as an extent, and that wherever there is an extent from the crown to ſeiſe the goods of a bankrupt, though after a commiſſion executed, yet if it comes before an alteration of the property, the extent ſhall take place, and alſo that the crown had the prerogative to have a preference in point of time, nor would the court ſplit a day. So *Jefferies* v. *Williams*, 2 *Sho.* 480. *Skin.* 162. Next whether the property has by the ſeiſure been veſted in the landlord; for if not, the conſequence is plain, ſuppoſing no exception out of the general rule, it is not altered either on the foot of a common law diſtreſs or the ſtatute of King *William*. A common law diſtreſs was by witholding the uſe and occupation of the party's property to force payment of a debt, which ought to be paid: but diſtrainer could neither uſe or diſpoſe of that property nor could it be ſold by courſe of a common law diſtreſs, diſtrainer not having a ſhadow of property, nor even poſſeſſion: for though he takes the goods to his own houſe, they are never in his cuſtody, but as in cuſtody of the law, and his houſe is the pound, 1 *Inſt.* 47. as the ſheriff's cuſtody is the cuſtody of the law: ſo that this is the loweſt degree of even poſſeſſion ſo far from being property. The right of uſing and diſpoſing makes property; a cow diſtrained cannot be milked, nor a horſe rid, *&c.* That a diſtreſs cannot be worked, becauſe no property or poſſeſſion in law, ſee *Ow.* 123. *Dy.* 280. *Rol. Ab.* 648, 673, 879. *Noy* 119. *Cr. J.* 147. *Yel.* 96. *Cr. E.* 783. 6 *Mod.* 206. Diſtreſs then is not excepted out of the general rules. As to the ſtatute giving power to ſell in five days, they were not expired, nor could the goods be ſold. It is ſaid by way of exemption out of the common caſe, that diſtrained goods are not forfeited by attainder or outlawry; and that neither diſtrained or pledged goods are liable to be ſeiſed on an extent without payment of the money; and that *treſpaſs* or *trover* would lye for the landlord, againſt whoever took them out of his poſſeſſion; that at common law if the owner of the goods did not pay the debt, the landlord could never ſell at all, but they would remain in his hands, and then that it would be abſurd, that the crown might after a great number of years come and take

them out of his poſſeſſion. The not being forfeited turns on a different principle; the crown there, claiming only by virtue of forfeiture, claims only what, the party had to give and diſpoſe of; nothing, but what he has, can he forfeit. No prerogative can interfere in that caſe, ſo that the crown ſhall be preferred to a ſubjects execution; it depending on the general nature of forfeiture, that is ſubject to all demands of third perſons. This caſe is an extent on a debt, in which debt there is a prerogative. The publick is to have the benefit of this prerogative: the argument *ab inconvenienti* to a particular perſon proves too much, and therefore nothing. Two caſes prove, that diſtreſs could not prevent an execution on part of the crown, and that ſuch was the practice and known courſe of the court. *K.* v. *Parry*, and *K.* v. *Dale*, particularly the latter, which was *Paſ.* 1719. in *Exchequer*, where an extent was taken out 4th *Nov.* againſt *Dale*, but his goods having been diſtrained 29 *Oct.* before by *Mitchel* his landlord for rent, an attachment was moved for againſt *Mitchel*, who refuſed to deliver them, the goods not being ſold within five days purſuant to the act of parliament, and therefore no right diveſted by the diſtreſs, and they were in the landlord's hands only by way of pledge: but the court refuſed the attachment, as he could not be ſuppoſed to know that, and it would be too much to puniſh him for his ignorance in point of law, and the ſheriff being negligent in executing the *Venditioni exponas*; he was therefore excuſed from the cenſure: but this goes on a ſuppoſition, that the law was clearly ſo, and if the caſe of a ſheriff, he would certainly be puniſhed. In *Brook*, *Property* 31, even a pledge ſhall go to the crown in caſe of an attainted perſon: but the crown's forfeiture would be ſubject to diſtreſs, becauſe the crown claims under the party: in this caſe under the law. Another caſe is Sir *John Ratcliff*'s 1 *Bul.* 29. of trover for jewels pledged; which leads to what is ſaid of a pledge, that it ſhall be protected againſt the crown: but a pledge is different, giving a ſpecial property to pawnee, and a right to uſe and ſell it after death of pawnor: therefore there is a property. *Ow.* 123. ſhews a diſtinction between a diſtreſs and pawn; that in a pawn there is a ſpecial property it may be worked, and aſſignee may detain it: not ſo of a diſtreſs. The one is in poſſeſſion of the law; the other of the party. 20 *H.* 7. *fol.* 1. and *Brook*, *Property* 52. It is ſaid *trover* and *treſpaſs* will lye for the landlord. 20 *H.* 7. lays it down otherwiſe. There is no rule, that wherever thoſe actions can be brought, that ſhall deprive the crown's prerogative. A carrier may bring *trover*, becauſe of his real property, 1 *Rol. Ab.* 4. ſo may ſervant, becauſe accountable to maſter: ſo may commiſſioners of bankruptcy. 1 *Mod.* 31. ſo from poſſeſſion. No particular inconvenience can be ſet up againſt the prerogative of the crown: beſide there is none in reality; and he may diſtrain again, if any thing remains to be diſtrained. This plea then cannot be good.

Starkey

Starkey for defendant. Diſtreſs at common law was only a pledge for payment of rent arrear: the ſtat. of *William* and *Mary* extends only to one ſort of diſtreſs: but other diſtreſs ſtands as at common law, and ſo muſt this be taken. It is true, that by diſtraining either at common law or by ſtatute, no ſuch property is gained, as that *trover* or *treſpaſs* will lye, that remaining in the tenant diſtrained; and a difference between mortgages and pawns has been pointed out, particularly that mortgagee has the abſolute legal property, as in *Ratcliff*'s caſe. It is inſiſted, that pawnee has a ſpecial property, though the general is in pawnor, neither of which diſtrainer has. Allowing the diſtinction taken between a pawn and diſtreſs, it will not be denied, but that diſtrainer has an intereſt in his diſtreſs, though not ſuch as in law is called property or poſſeſſion ſo as to maintain *trover* or *treſpaſs*. There are rights of different kinds beſide thoſe of having and poſſeſſing. *Plo.* 487. *b. Hob.* 336. Goods diſtrained cannot be forfeited by outlawry: the intereſt, parties have in their diſtreſs, protects them in ſeveral caſes; and though it may differ from the intereſt in a pawn, it is guarded and ſecured. Diſtrainer may maintain writ of *Parco fracto*, and of *reſcue*; ſeiſe on freſh purſuit, wherever found, and impound again, as in caſe of a pawn, 1 *Inſt.* 47. *b. Rol. Ab.* 438. and as pawnor becomes intitled to the pawn again on diſcharging it, ſo is diſtrainee on paying rent arrear. Pawnee's intereſt goes to executor or adminiſtrator, ſo of diſtrainer's; and after his death the bailiff taking the diſtreſs may juſtify. 15 *E.* 4. 10. So that though a pawn and diſtreſs differ in ſome reſpects, in others they do not. *Brook, diſtreſs*, and *pledge* 28. 5 *Co.* 76. Though diſtrainer cannot maintain *trover* or *treſpaſs*, he may a proper action. Indeed goods diſtrained may be replevined giving ſecurity; but this is only pending the litigation on replevin: the intereſt of diſtrainer is the ſame after judgment as before. *Carpenter*'s caſe 8 *Co.* 146. and *Ow.* 124. There is no caſe in point, that the crown's execution ſhall take place of an antecedent diſtreſs: the general rule is, that diſtrained goods ſhall not be taken in execution without diſtinction whether at ſuit of the crown or ſubject. *Stringfellow*'s caſe, principally relied on, was at the time a diſputable point, and, though determined in favour of the crown, it was contrary to the opinion of ſeveral. *Callis's Reading* on ſtat. *H.* 8. *fol.* 196. allowing it, there is no reaſon from this diſputed authority to carry the prerogative farther, than the judgment ſtrictly warrants; and all, that is to be collected from it, is, that an execution of the crown is to be preferred to execution of the ſubject not compleated and become abſolute; as where goods taken by *fieri facias* and not ſold, *Comb.* 152; ſo where extended, and not a *liberate:* but otherwiſe no ſuch prerogative. The acts of parliament of ſtatute, ſtaple, merchant, and bankruptcy are not applicable. 1 *Jo.* 203. The prerogative of the crown in incompleat executions is not applicable to diſtreſs, which is not an execution; for if ſo, it could not be replevied. It is made by the party himſelf;

not founded on a judicial determination: whereas executions are by office of courts of juſtice, and grounded on judgment on record. The ſheriff as an officer of the crown, in an execution, muſt prefer the king's debt; diſtrainer acts not under authority of a court of juſtice. But if diſtreſſes could be compared to executions, they are in themſelves compleat; and nothing farther to be done. The intereſt thereby gained cannot be enlarged, not even by judgment in *replevin*, diſtrainer having after that no larger intereſt than before: and though by the ſtat. of *William* and *Mary* a diſtreſs may be ſold for ſatisfaction, that is in option of the party, whether he will purſue that or the common law: and it is extraordinary, that a ſtatute for benefit of landlords ſhould be made uſe of to their diſadvantage. Till execution is compleat, no property or intereſt is gained by the plaintiff: the ſheriff indeed has a ſpecial property ſo as to maintain *trover* or *treſpaſs*, as being in cuſtody of the law: but in *diſtreſs* for rent arrear though not ſtrictly a ſatisfaction for the rent, yet is it all the ſatisfaction, may be had, and ſuch an intereſt that if taken out of the pound, the law gives a proper action for redreſs: and *diſtreſs* is ſo far a ſatisfaction, that it may be pleaded in bar to an action. *Raſt. debt.* 1 *Sal.* 248. *diſtreſs* is a proceeding *in rem*. Diſtrainer has a lien: whereas the intereſt of plaintiff under an execution is not in the goods themſelves, but in the money ariſing by ſale. Before the ſtatute *H.* 8. *Diſtreſs* was the only remedy for arrears of rent ſervice or rent charge in fee or tail. *Debt* could not be brought, becauſe it was a rent of inheritance: by that act a double remedy was given. There could be no ſecond diſtreſs till 17 *C.* 2, 7. and 8 *Anne* 14. gives a farther remedy. As this was the only remedy for arrears of rent, it is not eaſy to conceive, they ſhould be liable to be defeated by the crown's execution; for ſo none could be ſure under a diſtreſs as an execution might iſſue many years after it, nay after a judgment in *replevin* in favour of it; for notwithſtanding that the goods continued in ſame ſituation after judgment as before; and ſo all might be defeated. The crown's prerogatives depend on immemorial uſage, not on opinions of courts of juſtice. *Hard.* 27. *Plo.* 322. There is no reaſon to allow the prerogative of the crown againſt diſtreſs, becauſe it has prevailed againſt an incompleat execution. It lies on the crown to ſhew uſage and exerciſe of this pretended prerogative: otherwiſe its execution muſt ſtand on the ſame foot as a ſubject's. Such prerogatives, as are not in ſtat. 17. *E.* 2. muſt appear from judicial determinations or conſtant experience. As to *The King* v. *Parry* the extent was teſted before the diſtreſs; and therefore could affect the goods bound from the *teſte*. As to *The King* v. *Dale* it might be too hard to puniſh by attachment becauſe of not underſtanding the law. If the crown can take goods out of the hands of diſtrainer, that will give a right to do the ſame in caſe of an innkeeper, and ſo give the king a greater right than the real owner, who cannot take his horſe from an innkeeper, till he has paid him; and

yet

yet inn-keeper has no property. But the property in this caſe is immaterial. As there is no authority, ſo on the reaſon no more colour for defeating the intereſt gained by diſtreſs, than that gained by a pawn; which though in many reſpects different, yet as both are intereſts independent on the general property of the King's debtor, it is unreaſonable, that either ſhould be hurt, in order that the crown ſhould receive ſatisfaction. That would be contrary to the general notion of prerogative to found it in the wrong of the ſubject. What is ſaid of the *St.* 33 *H.* 8. *c.* 39. is confined to executions merely. Until that ſtatute no execution at all could have iſſued on bonds of this kind, on which the extent is founded; to contend therefore for this prerogative iſſuing on this bond, which is given only by 33 *H.* 8. cannot be an immemorial prerogative. It is ſaid, wherever the abſolute property remains in the King's debtor, the goods are ſubject to the King's execution; and that the abſolute property remains in diſtrainee, diſtrainer having no ſuch ſpecial property as pawnee has ſo as to maintain *trover*, *&c.* but even *String fellow*'s caſe proves, that where there is ſuch a ſpecial property as to maintain *trover* or *treſpaſs*, it may yet be liable to the King's execution. So where goods are ſeiſed by warrant from commiſſioners of bankrupts, who may maintain *trover*, yet will not that protect againſt the crown's execution. The prerogative is confined merely to executions, and will not affect a particular intereſt gained by act of the party or law, not in the way of an execution, as a pawn or diſtreſs. Proceedings on Commiſſion of bankruptcy are in nature of an execution, *in fieri* until aſſignment made: but diſtreſs is abſolute and compleat. As to diſtrainee's being attainted, it is held in *Plo.* 487. that where pawnor of goods is attainted, the crown cannot have them without paying the money; for that the prerogative will not prejudice another; 13 *R.* 2. which reaſon of the court holds in both caſes. It is not controverted, but that diſtrainer may withhold diſtreſs againſt the crown claiming under forfeiture of diſtrainee: but that is ſaid to be, becauſe the crown muſt come in on the ſame terms as the forfeiting perſon, ſubject to his incumbrances, and liable to diſcharge the goods pawned, and to pay the rent arrear; nay that an execution though incompleat will bind the crown in caſe of a forfeiture: but that the preſent claim is not under diſtrainee; but a contention with diſtrainer for preference in point of ſatisfaction. The crown claims by prerogative; not under, nor ſtanding in ſame light as, the forfeiting perſon. *K.* v. *Baden*, *Shower's Parl. Ca.* where the King's title on outlawry took place of a judgment, though antecedent to the outlawry. *Plo.* 262. 9 *Co.* 129. *Hard.* 24. There are many caſes alſo, where the crown will have the whole under forfeiture of a perſon having only a partial intereſt. If a joint obligation, and one is outlawed, the crown will take the whole. If one obtaining a judgment is outlawed, the crown may extend all the lands, though the party himſelf could extend only a

moiety; *Cr. J.* 513. may diſtrain for rent-ſeck, though the party could not. 5 *Co.* 56. that the crown takes in a different way. 2 *Hale's P. C.* 254. *Auſten's* caſe, *Plo.* 560. *Hob.* 323, 4.

The court took time to conſider of it as of very great conſequence both to the King and ſubject.

Lord Chief Baron *Parker* now delivered the opinion of the court.

Two things are to be premiſed, which are agreed upon: firſt, that if the goods diſtrained had been actually ſold before the day, on which the extent bears *teſte*, no colour would exiſt for a ſeiſure; becauſe the extent authoriſes the ſeiſure, and after ſale the property would be out of him, and veſted in a ſtranger. The ſecond, for the ſame reaſon, that if this had been the caſe of pawned or pledged goods before the day, they could not be legally ſeiſed, becauſe the property would be altered; and *Fitz.* 121, and *Plo.* 487, prove no more as to pledges, than what is here admitted.

Pawns.

The general queſtion is, whether the goods are not liable to be ſeiſed for an immediate debt of the King's own, after a diſtreſs taken by the landlord for rent juſtly due, and before a ſale of thoſe goods.

Conſider the nature and effect of diſtreſs; which is (ſo far as applied to the preſent) where cattle, *&c.* are taken for rent in arrear, which are to be kept in pound until diſtrainer is ſatisfied of the rent, or the cattle, *&c.* releaſed by courſe of law, or replevied. Now conſider its effects affirmatively and negatively. Goods ſo diſtrained are not liable to diſtreſs of another ſubject, becauſe in cuſtody of the law, *Brook, Diſtreſs* 75; nor to another ſubject's execution. *Bro.* 28, and *Finch's Law* 11. This appears farther, where the King claims by forfeiture on attainder or outlawry. *Bro. Pledges, Cr. J. Plo.* 487. Diſtrainer's executor ſhall have the benefit of teſtator's diſtreſs, 15 *E.* 4. 10. but cannot be in a better condition, than his teſtator was. Diſtrainer neither gains a general or ſpecial property, nor even a poſſeſſion, in the things diſtrained; cannot maintain *trover* or *treſpaſs*; for they are in cuſtody of law by act of diſtrainer. So held expreſſly and fully, *Mich.* 20 *H.* 7. *fol.* 1. *pl.* 1. that the pound is an indifferent place between them, *&c.* and *Bro. Property* 52, *Ow.* 120, and *Cr. E.* 78. in 1 *Rol. Ab.* 673, *Noy* 119. held, he cannot milk a cow: yet in *Cr. J.* 147, 8. it is held otherwiſe, and 12 *Co.* 101. countenances this opinion: but this point not being directly in judgment, I will leave it undetermined. That goods diſtrained are in cuſtody of law. 1 *Inſt.* Diſtrainer could not work a diſtreſs, much leſs ſell it: but otherwiſe of the crown; as in *Madox* of the *Exchequer* it is held the duty of the ſheriff to ſell

Diſtreſs its nature and effects.

the diſtreſs at a juſt and reaſonable price, ſo that the owner is not aggrieved.

Extent: its nature.

Now conſider the nature of an extent of the King. An extent binds the property of the goods of the King's debtor from the *teſte*. 41 *E.* 3. and *Fitz. Execution*, and *Dy.* 67. *b. String fellow*'s caſe; which caſe, notwithſtanding what *Callis* thinks in his *Reading* on *St. H.* 8. I will ſhew to be law. *Hob. Sheffield* v. *Ratcliff*, abridged 2 *Rol.* 158. ſo in *Q.* v. *Tanner*, *Mich.* 8 *Anne* in *Exchequer*, where it was held, that an extent for the King's debt bound the property of the goods, *&c.* from the *teſte*; and in *Bracy* v. *Dawſon*, *B. R. Mich.* 6 *Geo.* 2. Lord *Hardwicke* cited and relied on *String fellow*'s caſe as clear law: and though the ſheriff may maintain *trover* or *treſpaſs*, which diſtrainer cannot do becauſe anſwerable over, 2 *San.* 47. and other books, yet goods ſo taken in execution are liable to ſeiſure on extent before ſale. But *String fellow*'s caſe is rather admitted than denied by defendant's counſel: but a diſtinction is endeavoured, which is not well founded. The rule holds equally by ſeiſure on warrant of commiſſioners of bankruptcy; as in *K.* v. *Crumpton*, cited 2 *Sho.* 481. and *Tremain's P. C.* 637; which caſe in a manuſcript report of it from Baron *Legge* was thus: The King's debtor became bankrupt; and a commiſſion of bankruptcy was ſued out, and an aſſignment; and an extent iſſued for the crown, teſted the day of the aſſignment; and the extent was preferred; and this by *Hale* Chief Baron. It is objected for defendant, that the act ſpeaks of creditors in general without naming the King, who therefore within the rule ſhall not be bound, becauſe not named; and 1 *Jo.* 202. was cited: I admit this in general to be true: yet the reaſon given by *Sho.* that the property was not altered, is the true reaſon; which will appear by ſuppoſing the extent in that caſe had iſſued the day after the aſſignment; for then it would be a clear caſe againſt the crown; as the property of the goods would be out of the bankrupt, and veſted in the aſſignees; and conſequently being goods of another man, an extent afterward cannot ſeiſe the goods of a ſtranger; nothing barring the King but the aſſignment, which bars him, becauſe it alters the property, and is the true diſtinction. Another diſtinction inſiſted on between *String fellow*'s caſe and this is, that a diſtreſs is compleat: whereas that was only *in fieri*. But to that I anſwer, that diſtreſs is not compleat, becauſe no ſatisfaction: but ſuppoſing it was, the goods are liable to ſeiſure on extent until an alteration of property. This objection was endeavoured to be inforced for two reaſons: firſt that this would be hard, becauſe a perſon might diſtrain, which might be defeated ſeveral years afterward; but that according to the maxim, *quod ab initio non valet*, *&c.* will not mend diſtrainer's condition: ſecondly that *levying by diſtreſs* was a good bar; and 1 *Sal.* 248. was cited: to which I anſwer, that it is agreed in that caſe, that if the diſtreſs dies

Bankruptcy. Extent, teſted the day of aſſignment, preferred.

Diſtreſs no ſatisfaction.

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in the pound, or eſcapes without default of diſtrainer, he may diſtrain again. *Dy.* 280. *b.* *Hob.* 61. and ſo he may diſtrain *de novo*, where the diſtreſs legally evicted without his default; for levying diſtreſs is only a temporary bar, and no ſatisfaction.

Where inn-keeper gains property in diſtreſs.

It is objected then, that diſtrainer gains a right to the goods diſtrained until payment of the rent; which is compared to the caſe of an inn-keeper, who may diſtrain a horſe for his keeping, though, as it is ſaid, he has no property: and farther it is ſaid, that the property in this caſe is immaterial. As to the caſe of the inn-keeper no authority has been cited to ſhew, whether he gained property or not: and if 2 *Rol. R.* is compared with *Yel.* 66. it will be found, that there was a difference of opinion between great men. But taking it either way, whether as property gained by inn-keeper or no, it is begging the queſtion, or arguing in a circle. We deliver no opinion in the caſe of an inn-keeper, becauſe not now before us. The latter part of the objection, that the property is immaterial, ſurpriſes me; for the plea has expreſſly traverſed the property of the goods in queſtion at the time of iſſuing the extent; and if the property is immaterial, here is an immaterial traverſe, and the plea bad for that; for traverſe in pleading ought to be material and iſſuable. But the traverſe is proper; becauſe it traverſes the title of the crown found by the inquiſition; for in *K.* v. *Mann*, *Hil.* 1726. in *Exchequer*, whoever traverſes a title, muſt traverſe the title ſo found, and not force the crown to take traverſe; though the crown has election to traverſe the inducement or the traverſe ſet out by defendant: but the inducement to the traverſe is only inſufficient here, which is the fault of this; for notwithſtanding the diſtreſs they continue liable to ſeiſure: but according to the rules of pleading even between ſubject and ſubject there ought to be a proper inducement in every traverſe to ſhew the matter in traverſe material: it ought to be ſuch, as if true, will defeat the title of the other party, otherwiſe it amounts to a negative pregnant. *Bro. Pleading* 35. *Yel.* 147. *Comyns* 302. *Daliſon* . *Pal.* 71. 2 *Rol. R.* 52. 3 *Lev.* 167. In anſwer to 13 *R.* 2. relied on for defendant, it is inſiſted, there is a difference between that and the preſent caſe; for that where the King claims by forfeiture, he claims under the forfeiting perſon, and cannot have a better right to the goods diſtrained, though he may have a better remedy: but in the preſent caſe the King and defendant are creditors, and both purſuing a legal remedy, and the King is intitled to a preference of ſatisfaction. Defendant's counſel controvert this propoſition, *viz.* that in forfeiture the crown claims under the forfeiting perſon inſiſting on claim by prerogative, citing *Plo.* 262. that huſband *felo de ſe* forfeits the whole. The reaſon of that is, that the title of the crown and wife concurring, the crown's muſt be preferred, and is not applicable. Nor is 9 *Co.* 129. for the crown did not claim by forfeiture;

Pleading. Traverſe to be material and iſſuable.

Proper inducement to traverſe.

The King's claim by forfeiture different from that of a debt.

forfeiture; and 5 *Co.* 56. ſhews, the King claims by the ſubject; which was one of the things inſiſted on for the crown in this caſe. Conſider the inſtances put by Lord *Coke* in that caſe: firſt of a rent-ſeck; the nature of the rent is not thereby altered; but it only ſhews, the King ſhall have a better remedy, than the forfeiting perſon would have had: next of a bond or recognizance of a ſubject outlawed or attainted; *Cr. J.* 513. and *Hard.* 24. which is ſtill but a farther advantage in point of remedy. So of the King's taking advantage of a condition without demand. The laſt inſtance is a purchaſe of a ſeigniory by the King of lands held in poſteriority; the King there claims by purchaſe not by forfeiture; and ſo not applicable. The next caſe is in *Hale's P. C.* 254. but in *Plo.* 560. it is found, the law would be otherwiſe, if the King had claimed by forfeiture: ſo that this caſe is far from being an authority for defendant. The laſt caſe on this head is that cited in *Sho. Parl. Ca.* 72. which was on a particular reaſon not applicable to the preſent; that he, who pleads, ought to have a legal title prior to the eſtate in the inquiſition; and that it was his fault in not having a good title againſt the crown.

Next I will deliver the ſenſe of the court on the queſtion. We think, there is a difference between caſes, where the King claims by forfeiture on attainder and outlawry, and where he ſues for recovery of a debt; for a man can only forfeit what he has: although the King may in reſpect of forfeiture be intitled to an advantage in point of remedy, the forfeiting perſon would not be intitled to. That a man can only forfeit what he has, *Plo.* 487. 1 *And.* 19. *Mo.* 100. *Cranmer's* caſe: though this ſeems to be but common ſenſe. The caſe in 2 *Keb.* 775. differs largely from the report of the ſame caſe in 1 *Ven.* 132. as to what *Hale* ſays there. I have ſeen an accurate manuſcript report of this caſe, which ſays, that there is a difference between the King's debt and this caſe, citing *Hob.* 339. and *Hard.* 24. It was objected, that the King's prerogative muſt be immemorial. *Plo.* 322, and *Hard.* 27. I admit, the prerogative depends on preſcription, uſage, or ſtatute: but when power is given by that ſtatute to iſſue proceſs as an expedient in the court's diſcretion, ſuch extent ſhall have the ſame effect as an extent on ſtatute-ſtaple or judgment at common law. It is next objected, that the prerogative cannot do a wrong; for which was cited *Plo.* 487. the ſame law giving the ſubject property in the goods, eſtabliſhes the prerogative; and no injury, though ſome hardſhip: and there would be the ſame objection in *Stringfellow's* caſe, which yet is undoubtedly law; as alſo *Crump* v. *Hanbury*. The next objection is, that this prerogative is not enumerated in the *St. de Prerog. Regis.* in *Plo.* 322. and 1 *Ld. Raym.* 24. it appears, that ſeveral prerogatives are not enumerated in that ſtatute. The laſt objection, that where prerogative is claimed by preſcription, precedents ought

Prerogative.

to be ſhewn of the judicial allowance of that particular prerogative, but that none are produced as to diſtreſs: to which I anſwer, that though no precedent is produced, yet this caſe falls within the principle of *Stringfellow*'s caſe and of *Crump* v. *Hanbury*, that where the property of the goods is not deveſted out of the hands of the King's debtor, they are liable to extent; and where the reaſon is the ſame, the law muſt be the ſame. But there was a precedent above 30 years ago in this court, *K.* v. *Dale*, where no property was deveſted by the diſtreſs, and the goods were in the landlord's hands only by way of pledge; which is in point: and no objection can be made, that the court did not grant an atrachment there; for it was through miſtake. The court does notproceed by rigour: and it happened to us this very term, where we did not grant an attachment upon the ſame ground. This plea therefore cannot be ſupported without overturning principles of law unqueſtionably eſtabliſhed, and without contradicting the opinion of the court in *K.* v. *Dale*.

Judgment ought therefore to be for the King.

Error in Exchequer chamber. Where the party dies: the new writ not there.

Note: In 1753. a writ of error returnable into the *Exchequer Chamber* having iſſued upon this judgment, pending which defendant died, whereby the writ abated: *Lord Chancellor* and the two Chief *Juſtices* were of opinion, that the new writ could not be properly to the *Exchequer Chamber*: becauſe the record did not reſide with them; and the words of the writ are, *record. quod coram vobis reſidet*; for only a tranſcript of the record is ſent into the *Exchequer Chamber*, and the record itſelf remains in the court of *Exchequer*: but the court made a rule for a *remittitur* to be entered on the record together with a ſuggeſtion of the death.

Caſe 98. Earl of Derby *verſus* Duke of Athol, *June* 6, 1751.

LORD CHANCELLOR.

Privilege.

If a Peer plaintiff gives a rule for examining witneſſes, defendant may proceed to examine without fear of breach of privilege. So if a Peer brings an action at law, it is no breach to bring a bill for injunction.

Legal

Legal *verſus* Miller, *June* 10, 1751. Caſe 99.

At the Rolls.

Poſt Pitcairne v. Ogbourne, 375. 29 July 1751.

Bill for performance of written agreement; parol evidence read of different agreement: diſmiſſed with coſts; and plaintiff cannot reſort to agreement ſet up by defendant.

AGREEMENT in writing for taking a houſe at 32*l. per ann*; and part of the agreement was, that the owner ſhould put the houſe in repair: it was afterward diſcovered not to be worth while barely to repair the houſe, but better to pull it down; and therefore without alteration of the written agreement at all the houſe was pulled down by conſent of the tenant, appriſed of the great expence it would be to the landlord; and therefore an agreement was by parol only on his part to add 8*l. per ann.* to the 32*l.* which he was only to give, in caſe it was repaired. The tenant brought a bill for ſpecifick performance to have his leaſe on the foot of the written agreement to pay only the 32*l.* rent. The defendant by his anſwer ſet up the parol agreement.

Sir *John Strange.*

Parol evidence allowed, where a hard agreement or in part executed.

Such evidence is frequently ſuffered to be read, eſpecially to rebut ſuch an equity as now inſiſted on by the bill; as where the agreement is in part carried into execution, parol evidence is allowed to prove that; or where it is a hard agreement; and the court may thereupon decree againſt the written agreement; as in 1 *Ver.* 240. and the ſingle queſtion being here, whether the court ſhould decree a ſpecifick performance of the agreement, the plaintiff inſiſts upon, and being ſatisfied from the parol evidence that it ſhould not, the court muſt diſmiſs the bill.

For plaintiff it was then inſiſted, the court ſhould not diſmiſs the bill, but on the general relief prayed, ſhould make a decree now according to the agreement, defendant ſet up, though no croſs bill for that; which had been often done upon defendant's own ſubmiſſion.

Againſt this it was ſaid, the court never made ſuch a decree on the general relief, where it was inconſiſtent with the particular relief prayed: though it has been done, where not inconſiſtent.

Sir *John Strange.*

I am ſtill of the ſame opinion, and that the bill ſhould be diſmiſſed with coſts; for that would be very hard upon a defendant, if a plaintiff ſhould unconſcienſciouſly bring him into a court of equity, when defendant ſhould inſiſt on an agreement different

from that, the plaintiff ſets up, and the plaintiff ſhould reply to his anſwer, and inſiſt on his former demand, and go into a long proof; and afterward, finding he cannot have the decree prayed by his bill, ſhould reſort to that, which defendant ſets up, and inſiſt on a decree for it.

Caſe 100. Fawcet *verſus* Lowther, *June* 15, 1751.

TWO iſſues had been directed; the firſt to try, whether by cuſtom, from the time whereof the memory of man was not to the contrary, within the manor of *R.* the tenants of the tenant right eſtates within the manor have not uſed to mortgage ſuch eſtates by deed on condition to be void, if the mortgage-money is paid within three years from the time of making the mortgage or any leſſer time, and the mortgagees have right to preſent ſuch mortgage-deeds, and to be admitted thereon at the next court of the manor held after breach of the condition, paying a fine to the lord? The ſecond iſſue was, whether by the cuſtom of the manor on ſuch mortgage made, and mortgagor's dying without iſſue of his body lawfully begotten, and without having aliened the equity of redemption by any diſpoſition purſuant to the cuſtom of the manor; the lord of the manor became intitled to the equity of redemption of ſuch mortgage? With a direction that if the defendants *Copeland* and his wife, who claimed the redemption as collateral heir of the mortgagor, ſhould ſign the regiſter's book, and conſented to give up their claim to the right of redemption of the mortgaged premiſes, they ſhould go to trial on the firſt iſſue only.

A motion had been made 11 *July* 1750. to vary the ſenſe of theſe iſſues; which *Lord Chancellor* refuſed, as the cauſe muſt be reheard for that. It being at the ſame time inſiſted for the mortgagee that he is not to wait, until the queſtion of the equity of redemption is determined; for that in ſeveral inſtances the court has directed the defendants to make the redemption among them, and an aſſignment to the ſenior ſix clerk. *Lord Chancellor* ſaid, a caſe of that kind ſeldom aroſe, and if a mortgage was of an eſtate ſo circumſtanced as this, it cannot be helped.

On a rehearing, objections were now made as to both iſſues. Firſt, that the cuſtom ſet up by the firſt iſſue on part of the plaintiff is unreaſonable, and not good in point of law, and therefore ſhould not be ſent to be tried, being contrary to the general cuſtom of the manor, and to an indenture 22 *Eliz.* which lays down rules for all alienations, that they are to be preſented at the next court; that a mortgage is an alienation though on a condition ſubſequent to defeat the eſtate, and therefore within that rule; and this indenture is intended

tended to ſettle all diſputes and cuſtoms of the manor. It is unreaſonable in itſelf, and could not have a good commencement, becauſe ſo highly prejudicial to the intereſt of the Lord, as he will thereby loſe his fine on all theſe alienations. This differs from the caſe of copyholds; becauſe ſurrenderee muſt come, and have it preſented at the next court: here they need not come under three courts. It is a great inconvenience alſo to the tenant, as it will be liable to frauds; for a mortgage may be made not preſented in three years, in mean time mortgagor or tenant may have made an abſolute conveyance, vendee may have come and have his preſented, and over-reach him. The next and ſtrongeſt objection to ſhew this cuſtom void is, that this differs from moſt caſes, not only of copyholds but of tenant right eſtates; for here it is ſo reſtrained, that it muſt deſcend to his iſſue, cannot to the collateral heir, and ſhall for want of iſſue eſcheat to the Lord unleſs an alienation is made: whereas by this means the Lord cannot know his tenant. The mortgagor remains tenant on the records of the manor; the mortgagee for three years has a conveyance, may come at the end of three years, have it preſented, and be admitted; and that after death of the tenant without iſſue, as plaintiff inſiſts; which will prevent the Lord of his eſcheat. As a further aggravation of this, it is a military tenure, and the Lord muſt know his tenant; otherwiſe he cannot know whom to call upon for performance of ſervices, nor make a forfeiture for want of performance. But ſuppoſing it may be good in point of law, and not void for unreaſonableneſs, there is not ſufficient proof of ſuch a cuſtom, and therefore no iſſue to try it. As to the laſt iſſue, it is not proper to direct it to be tried at all. Whether there can be an eſcheat of an equity of redemption, was never yet indeed determined; but it muſt be now taken, that there may: and ſo of a truſt, which was alſo never ſo determined, but it muſt now be taken in the ſame way: or elſe there would be an end of eſcheats, becauſe moſt of the land in *England* is now, and all will ſoon be, in truſt, it anſwering the purpoſes of families, avoids better the fatality of ſlips in conveyances, and this court will conſider the owner of an equitable in the ſame light as owner of the legal eſtate; there beingan exact conformity between the courts, governing by ſame rules, ſave in one ſingle inſtance, that there is no tenancy in dower of a truſt, which was an opinion conceived, before it was conſidered, and is never mentioned without the courts ſaying, that was without being attended to: and Your Lordſhip held in *Caſborne* v. *Inglis*, that there ſhould be tenant by courteſy either of a truſt or equity of redemption notwithſtanding the old authorities. This is a mere queſtion of equity, whether equity ſhall follow the law as to eſcheat; and cannot then be a queſtion of fact. It is juſt ſuch a queſtion, as aroſe lately in *Burgeſs* v. *Wheat*, between the crown and juſtice *Page* a truſtee, whether he or his deviſee ſhould have

Hilary Vac. 1737 cited ante Hearle v. Greenbank.

it to himſelf, or be conſidered as a mere conduit-pipe? But it was never determined.†

† It was after wards determined by Lord Chancellor Northington on the opinion of himself & Sir Thomas Clark Master of the Rolls against that of Lord Mansfield. See the report of the case in 1. Blackst. Rep. 123.

LORD CHANCELLOR.

The court is not bound to ſend a cuſtom to be tried, which on the face is clearly void in point of law: if doubtful, that is no reaſon, why it ſhould not be tried. This rule holds in all courts of equity; as in the *Exchequer* if a *Modus* inſiſted on in the anſwer appears clearly void in law, that court will not ſend it to be tried. No authority is cited to prove, that this is void in law. It is plain, the indenture does not compriſe all the cuſtoms of the manor; and as a mortgage is different from an abſolute alienation, there is nothing abſurd in it; for why may there not be a diſtinct cuſtom concerning mortgages from that concerning abſolute alienations? This is abſtracted from the proof. As to the Lord's prejudice, the Lord is intitled to be paid his fine, when by the cuſtom the tenant is obliged to come to be admitted; and in that reſpect it is not different from the caſe of mortgages of copyholds, which are conſtantly done in that manner; conditional ſurrenders are made, and if that ſurrender is not preſented, the general cuſtom of the manor is, the ſurrender becomes void, and a new ſurrender taken; the eſtate does not become void. The Lord has not the fine on theſe mortgaged tenements; it was intended only to be a pledge; and it is unreaſonable, he ſhould pay a fine. The fines in this manor are indeed low: but ſo it is in ſome copyhold manors, which differ much as to what theſe fines are: but that will not differ the right. It is true as to the general cuſtom of copyholds, ſurenderee muſt come, and have it preſented at the next court: but there are ſeveral copyholds, where the tenant need not come under three courts; *Coke* on *copyhold*. As to the fraud by over-reaching, I do not know, that it would have that conſequence objected; but the ſame thing may happen in thoſe copyhold manors, yet the law does not therefore call that cuſtom void. As to the ſtrongeſt objection, that this will prevent the Lord's eſcheat, it cannot eſcheat by death of mortgagee without iſſue, becauſe he was never admitted tenant to the Lord; nor by death of the tenant without iſſue, for notwithſtanding that, the mortgagee may come and be admitted afterward. This differs it to be ſure from ſome caſes of copyholds or tenant right eſtates; but ſtill it is only in a greater degree: for the ſame thing may happen in all copyhold manors, where theſe mortgage-ſurrenders are made; for the tenant may die and without heir; which is poſſible, though not ſo likely to happen as a man's dying without iſſue; but it may happen. Then there is an eſcheat to the Lord; that is, it muſt be by death without heir of the mortgagor, who remains tenant ſtill: but notwithſtanding that, the ſurrender may be

Cuſtom or modus, void on the face, not ſent to trial.

Mortgage of copyhold.

General cuſtom of copyhold, ſurrenderee to preſent at next court. See post. 602.

Cuſtom for mortgagee to preſent at third court not void.

be preſented at the third court, though that is after death of the tenant without heir. Surrenderee has a right to be admitted; the death of ſurenderer in mean time making no difference, as has been held. The preſent caſe then differs not from that but in degree and in point of value; becauſe the poſſibility of dying without iſſue is much greater than that of dying without heir generally: but ſtill it is not of a different nature. The reſult of this is only, that it is prejudicial to or diminiſhes the Lord's caſualty or profit as to eſcheat: but that will not make it a void cuſtom. There are ſeveral cuſtoms diminiſhing the value of the Lord's eſtate, which notwithſtanding may have a good original. Though a cuſtom for a copyhold for life to commit waſte would not be good; yet for a copyholder in fee to do ſo it is good; though much more diminiſhing the Lord's eſtate; and much more unaccountable, how ſuch a cuſtom ſhould grow up, than this. Cuſtoms are ſuppoſed to take their riſe by grant or agreement. It might be a good foundation originally for an agreement between the Lord and tenants, that though the tenants are bound to preſent an abſolute conveyance at the next court, yet as to mortgages, where the eſtate is only a pledge, they are not bound to preſent till the third court. Till ſuch conveyance is preſented, and grantee and mortgagee admitted, grantor and mortgagor remain tenants. But it is a new doctrine to me, that this is a military tenure by *knight ſervice*, *eſcuage*, or the like. It does not appear, that one incident of a military tenure belongs to this eſtate, neither *wardſhip*, *marriage*, or *relief*. It is then an eſtate grown up by cuſtom, and originally a baſe tenure grown up like copyholds. They took their riſe from defence of the borders: but are not military tenures: nor is it ſhewn, that there are military ſervices, for nonperformance of which the tenant is to forfeit his eſtate. So far therefore as appears, the mortgagor remaining tenant till the mortgage-deed is preſented, and admittance on it; it anſwers all the purpoſes except as to the *quantum* of the value of this caſualty by eſcheat, as it may riſe ſeldomer; conſequently I cannot be of opinion, that this cuſtom muſt be taken on the face of it to be void in point of law.

Cuſtom not void for diminiſhing lord's profit.

Cuſtom for copyholder in fee to waſte good: not for life.

Cuſtoms ariſe by grant or agreement.

Tenant right eſtate not a military tenure.

If ſo then, it brings it to the queſtion of fact. The inſtances read on both ſides out of the books of the manor are very dark in general; but however there is very ſtrong proof made of this cuſtom by parol; which, I do not ſay, is concluſive: but it is fit for the conſideration of a jury.

But as to the next iſſue, which is only between the Lord and the collateral heir of mortgagor, *Copeland* and his wife, I think, the order ought to be varied. They did not much inſiſt on this

right of redemption; but, not ſigning the regiſter, it is to be conſidered, whether that part of the direction is now to ſtand. This is not proper to be tried by a jury; being a mere equity of redemption, on which the cuſtom certainly cannot operate. But an equity of redemption will follow the cuſtom as to the legal eſtate; as it does in *Burrough Engliſh* lands; which if mortgaged, the equity of redemption will deſcend to the youngeſt ſon, to whom the lands will deſcend: ſo in mortgage of *gavelkind*, the equity of redemption will deſcend to all: but that is not proper to be tried: whether that law, which it follows, be the general law of the land or *lex loci*, it is the ſame thing. But then a queſtion will ariſe, whether there can be an eſcheat of this equity of redemption to the Lord; which has never yet been determined that there can: nor ſhall I determine it now. Neither has the queſtion, whether there can be an eſcheat of a truſt, been determined. Though it is a conſiderable argument, that otherwiſe there will be an end of eſcheats, becauſe all the lands in *England* will be ſoon in truſt, yet that is contrary to the old doctrine. Defrauding the Lords of eſcheats was one of the miſchiefs recited in the ſtatute of uſes. The collateral heir cannot claim the equity of redemption, if he could not claim the legal eſtate. If then the lands can deſcend only to the lineal heir, it may be a queſtion between the Lord and the plaintiff, the mortgagee, whether the Lord has a right to call on him to redeem his mortgage on the foot of the eſcheat of that equity of redemption in him, which originally was in his tenant? That will remain to be conſidered after trial on part of the equity reſerved. It is contrary to the law before the ſtatute of uſes, when uſes were mere truſts. But I give no opinion upon that; for if found one way, there will be no occaſion to determine it.

Equity of redemption will follow the cuſtom as to the legal eſtate in deſcent, whether the general law of the land, or law of the place.

See acc. Watk. on Copyh. 120.

Whether eſcheat of equity of redemption or truſt, not determined.

See 1. Blackst. Rep. 123.

Attorney General v. Sands. Hard. 402.

The ſecond iſſue therefore muſt be left out: but as to the firſt iſſue, the directions muſt ſtand, and the decree be affirmed.

I will not on a direction to try a general cuſtom inſert every circumſtance attending every particular caſe, as the preſent caſe; for that would intangle the general cuſtom.

Caſe 101. Ramſden *verſus* Hylton, *June* 17, 1751.

Hylton *verſus* Biſcoe, & *e con.*

HENRY HYLTON, appearing to have been an incumbered, or rather a weak, man, intended in 1688 to diveſt himſelf of his eſtate, and make a ſettlement of it on his ſon *John*, reſerving proviſions to himſelf, his wife, and daughters. They

They reduced this into execution in 1688; by which the eſtate of the family was conveyed on truſt to raiſe ſeveral ſums, with a *proviſo* that as ſoon as *John* ſhould marry, or pay his ſiſters thoſe ſums, the truſtees ſhould convey the eſtate to *John* and his heirs. There were ſtill ſome diſputes in the family; but in 1693 *John* married the daughter of Sir *Richard Muſgrave*, and in 1694 made a ſettlement of this eſtate on this recital: that whereas he had intermarried as aforeſaid, and whereas Sir *Richard Muſgrave* and *Dorothy Madiſon*, his wife's grandmother in conſideration of the ſaid marriage, and the covenants, grants, and agreements aftermentioned, had paid, agreed, and ſecured to pay, to *John* 2000 *l.* for and upon the marriage-portion of his ſaid wife, *John* covenants to convey this eſtate by fines or recoveries to certain uſes; and covenants, that till the fines were levied he and his heirs ſhould ſtand ſeiſed to thoſe uſes. The uſes were to himſelf for life; remainder as to part to his wife in part of her jointure; remainder to the firſt, *&c.* ſon of the marriage in tail male; and afterward remainder to truſtees for ninety-nine years in default of iſſue male, on truſt that if there was no iſſue male, and two or more daughters of the marriage, to raiſe 8000 *l.* for their portions to be paid at twenty-one or marriage.

Truſt of ſettlement or articles after marriage, to raiſe portions for daughters on failure of iſſue male, to whom the eſtate was limited in tail; decreed to be raiſed after the failure, notwithſtanding a general releaſe by a daughter, the ſettlement not being known.

He died in 1707, leaving by this marriage ſix children, two ſons *Richard* and *John*, and four daughters, all then very young. His widow died in 1709. *Richard* came firſt into poſſeſſion of the eſtate, and acted as owner of it, making mortgages, *&c.* Upon his death his brother *John* came into poſſeſſion, and acted in ſame manner.

It did not appear, that this ſettlement or article was diſcovered or known in the family till after death of *John* the ſon, when it was found among the papers left by the grandmother of theſe four ladies in the hands of her repreſentatives. But after theſe ſiſters came of age, there were tranſactions between them and their brother *John*. Mrs. *Biſcoe*, one of the four, coming of age in 1727, an indenture was in 1728 entered into between her and her ſaid brother; which recited, that he was indebted to his ſiſter in a bond of 2000 *l.* to ſecure payment of 1000 *l.* with intereſt; and made a mortgage of part of the ſettled eſtate by way of ſecurity for payment of it, with a covenant that he was ſeiſed in fee: then came a clauſe, that in conſideration of that ſhe releaſes to *John*, his heirs, executors, and adminiſtrators, all actions, cauſes of action, ſums, portions, legacies, claims, and demands for and by reaſon of the will of their mother, or of *John*'s having taken adminiſtration to his brother *Richard*, or for his brother's or father's perſonal eſtate, or by leaſes for lives or years of the col-

lieries of his father, or for and by reaſon of any other matter and thing except the recited bond in this releaſe.

John Hylton died without iſſue male.

Three bills were now brought. The firſt by creditors, the ſecond by Sir *Richard Hylton*, deviſee of the real eſtate of the late *John Hylton* ſubject to his debts and incumbrances, to eſtabliſh the will and have the truſts performed; and a particular part of the relief prayed was againſt this ſettlement, which was now diſcovered, and inſiſted on by *Biſcoe* and his wife, to have that ſet aſide and delivered up. The third bill by *Biſcoe* and his wife to have the benefit of that ſettlement in 1694, as far as it related to the truſt term of ninety-nine years for raiſing 8000 *l.* for daughters in default of iſſue male; a fourth part of which ſum was claimed by her, as one of the four daughters of the maker of that ſettlement, in the event, that happened, of the iſſue male of her father and brothers having failed; and alſo to have a ſatisfaction for two ſums, one of 1000 *l.* under the mortgage in 1728, and 1000 *l.* legacy under the will of *John Hylton*.

Againſt the performance of the truſt of this ſettlement or articles ſeveral objections were made.

Firſt, that it was made after *marriage*, and muſt therefore be conſidered as voluntary. Though it muſt be admitted, that if a marriage is had, and a ſettlement afterward made, though no articles before, and a portion is paid, the portion ſo advanced, paid, or agreed to be paid at that time, will make it equal to a ſettlement before marriage and a covenant for valuable conſideration: yet this cannot be ſo becauſe of recital of this ſettlement, which is of a very particular kind; from which it muſt be inferred, that the 2000 *l.* was agreed to be paid at the time of the marriage not relative to any ſettlement to be made; ſo that the party was intitled to the portion, whether a ſettlement was made or not, and therefore voluntary on his part.

Next, the portion was not paid, or ſecured to be paid, nor any indorſement on the deed.

Next, it all reſts in articles and covenant, therefore ought not under all the circumſtances to be carried into execution. It is diſcretionary in a court of equity, whether they will carry articles into execution; which will not be done after a great length of time, nor ſo as to incur a great hardſhip or prejudice to either ſide; therefore if there cannot be a remedy at law, to which they muſt be left, there is no ground for equity to interpoſe; for there is a great difference between bills to ſet aſide rights or to carry them

them into execution. There are caſes, where the court will not relieve againſt a deed, when at the ſame time they will not upon a bill carry it into execution. On a contract for a leaſe of a houſe for a coffee-houſe it was found, that a chimney could not be made convenient for a coffee-houſe: on a bill to compel performance Lord *Talbot* refuſed it, merely becauſe the tenant would be obliged to take it for that purpoſe, he did not want. In *Faine* v. *Brown*, 12 *Dec.* laſt, a man was intitled to a ſmall eſtate under his father's will, given on condition that if he ſhould ſell it in twenty-five years, half the purchaſe-money ſhould go to the brother: he agreed in writing to ſell it; and afterward refuſed to carry it into execution, pretending to have been intoxicated with liquor at the time. A bill was brought to compel it. Your Lordſhip ſaid, that without the other circumſtance that hardſhip alone of loſing half the purchaſe-money, if carried into execution, was ſufficient to determine the diſcretion of the court not to interfere, but leave them to law. So in the caſe of *Oriel College* on a bill to have the benefit of deducting land-tax, the court relieved as to the future land-tax, but not as to the paſt. It is inconvenient to have this now trumped up; and ſeveral circumſtances of weight in theſe ſort of queſtions concur againſt an execution, as length of time, *&c.*

The acts of the family ſhew, this ſettlement was waved or laid aſide, and given up. They claim under a term in remainder after eſtates tail, which might have been barred by *John*, who was tenant in tail.

Mrs. *Biſcoe* has releaſed any demand, ſhe could have. *John* thought it reaſonable, that ſhe ſhould have no further demand on him and his eſtate: ſo did ſhe think, and on that releaſed. Then the equity is, that ſhe did not at the time know of this demand. The ſole ground, where a court of equity relieves on the want of knowledge, is, where the parties are drawn in to do ſomething, they would not do if known: but a reaſonable woman muſt have done, what ſhe did, if ſhe had known it. The 1000 *l.* under the mortgage-deed in 1728 was intended as a proviſion by *John* for his ſiſter, who had then no proviſion; then it was in part voluntary by him; and ſhe ought not to ſet up this demand againſt his eſtate, and at the ſame time claim a proviſion from his bounty, which he would not have made, if he had known this; ſo that he was under a miſtake as well as ſhe.

LORD CHANCELLOR.

As to the creditors bill, the relief is plain; and the directions of courſe, ſo as to part of the ſecond bill; but the queſtion ariſes on the relief prayed againſt the ſettlement. As to that I am in the

the firſt place of opinion clearly, that the praying to be relieved againſt that ſettlement in a court of equity is one of the moſt extraordinary demands even ſet up in a court of equity; for whatever becomes of that demand, there is no colour to bring a bill here to be relieved againſt it, and to have the ſettlement delivered up to be cancelled; for there is no fraud or impoſition to impeach it. The only queſtion therefore, that can ariſe as to that, muſt ariſe on the third bill; and, whether there are not ſufficient circumſtances by way of defence to that demand, is the true queſtion, and not by way of relief by ſetting it aſide. The ſecond bill therefore, ſo far as it ſeeks that relief, muſt be diſmiſſed; which brings it to the proper queſtion on the bill by *Biſcoe*, whether there is ſufficient ground in this court to relieve thereon, and to decree the 2000*l.* and intereſt, or whether the ſeveral objections made are not ſufficient to prevent a court of equity from interpoſing to have it raiſed? The ſettlement by *Henry* the grandfatherwas to truſtees and their heirs; ſo that the legal eſtate was in them; and the effect of that ſettlement was to create a truſt of the eſtate for his ſon ſubject to thoſe incumbrances on it; ſo that he was the owner in equity. The family was not quite at peace; but the proceedings thereupon are not material. If *John* the father had had the legal eſtate, the deed in 1694 would have paſſed it; therefore it does not reſt barely in covenant. It is true, he had but an equity; but if he had the legal eſtate, the covenant to ſtand ſeiſed in the mean time would have had its operation in point of law. There was nothing for the daughters, if there was iſſue male of the marriage. It does not appear, this ſettlement or article (however it is called) was known in the family. I am unwilling to ſuggeſt it; but I do not know, but there is ſome reaſon to ſuſpect, that *John Hylton* knew of it, the words of his will looking like it: but whether or no is not material. It was afterward diſcovered in the proper hands to find it in; and Mrs. *Biſcoe* now inſiſts on her ſhare under it, *viz.* 2000*l.* to which ſeveral objections are made: and indeed I have hardly ſeen ſo much litigation in a cauſe on a point of this kind, where ſo little ground appears for it.

Settlement after marriage, if a portion paid, equal to one before, and on good conſideration.

As to the firſt objection, this ſettlement was made after marriage: but there are many ſettlements and articles after marriage, which have been on good conſideration decreed to be performed in this court, and after a length of time. But it is farther ſaid to be voluntary; for though it is rightly admitted, that if a portion is paid, it will make it equal to a ſettlement before marriage, yet it is ſaid, this cannot be ſo: but the words of the ſettlement do not import that, on which this objection is founded; for it is alſo in *conſideration of the covenants, grants, and agreements aftermentioned*; and if they had agreed before marriage in that manner, that would have connected one with the other, and make it a good

conſideration : ſo that it appears a ſettlement made for conſideration agreed on between the parties at that time.

Iſſue are purchaſers under both parties, and may have benefit of the uſes, though the portion not paid.

As to the next objection it is not in every caſe, that, ſuppoſing the portion is not paid, the iſſue of the marriage ſhall not have the benefit of the uſes of the ſettlement or articles ; becauſe the iſſue of the marriage take from both parties ; and whether they perform their agreement among themſelves, may be immaterial to the iſſue ; and ſeveral decrees have paſſed on that foundation, they being purchaſers under both and conſequently both are obliged to perform. But there is no occaſion to enter into that ; for I am ſatisfied, the portion was paid ; and I wonder, they have made ſo much proof of it at this diſtance of time ; and then it appears to be for valuable conſideration.

As to its reſting in covenant and articles, it is partly ſo ; but it alſo amounts to a ſettlement of the equitable eſtate, he had, by that covenant to ſtand ſeiſed in the mean time. But ſuppoſing it reſted in articles, there are ſeveral inſtances of articles on marriage never carried into execution by an actual ſettlement, yet notwithſtanding as againſt thoſe parties and the family, thoſe articles are decreed to be carried into execution, though not perhaps againſt purchaſers. It often happens, that they never call for an actual ſettlement of thoſe articles : yet are they conſidered as ſuch, and many decrees are made on that foundation. As to the length of time, it is no objection in this caſe at all ; for it muſt not be computed from the date of the articles, which was long ago, but from the event that happened. If theſe ladies knew of the ſettlement, they had no right to this demand till failure of iſſue male, which was but lately. Suppoſing *Richard* or *John* had left iſſue male, and made all thoſe conveyances and ſettlements, and incurred all thoſe debts ; that iſſue male would have a right to have carried theſe articles into execution for their benefit, and to a decree for it, notwithſtanding the behaviour of *Richard* or *John*, not as againſt the mortgagees and incumbrancers without notice, but as againſt volunteers under *John*, or as his general creditors merely. If then the iſſue male would unqueſtionably have this right, there is the ſame reaſon, the daughters ſhould have the ſame benefit.

As to the waver, I do not underſtand the notion upon which it is argued ; for there is no perſon having a right to wave or give up the benefit of this ſettlement.

As to their claiming under a term in remainder after eſtates tail, that is an objection now againſt the raiſing this money, that has happened in ſeveral caſes, particularly in *Goring* v. *Naſh* ; in 22 Oct. 1744.

Portions raiſed under a term in remainder after eſtate tail and power of revocation.

which were both theſe circumſtances; a power of revocation in the father; and next the remainder, under which was *Lady Goring*'s claim, was a remainder after an eſtate tail in her brother; and theſe objections were made; notwithſtanding which I was of opinion, that demand muſt prevail, and ſhe had a decree accordingly. I took notice in that caſe, that the ſame objection was made in *Vernon* v. *Vernon*; for there the party claimed after a remainder in tail, and if the lands had been purchaſed, and a ſettlement made during the life of *Thomas Vernon*, he would be tenant in tail, and might have barred the remainder: but not having done it, nor any act of his importing an intent to do it, the houſe of Lords and Lord *King* held, it ought to prevail; and I was of that opinion: and beſide the eſtate tail being in the brother, there was a power of revocation in the father, which he might have executed, if he thought fit, and never did: and where the tree falls, it muſt lye: if people will not take the advantage, it cannot be helped.

General releaſe relates to the particular recital.

The ſtrongeſt and moſt material objection is the releaſe; but I am of opinion, it would not be conſtrued as a releaſe of this demand either in point of law or in a court of equity. Firſt it is certain, that if a releaſe is given on a particular conſideration recited, notwithſtanding that releaſe concludes with general words, yet the law in order to prevent ſurpriſe will conſtrue it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be releaſed. The particular point in conſideration was not relative to this eſtate, but what they could have againſt him as repreſentative of his mother, brother, or father's perſonal eſtate, to which the words are particularly confined. But there is no occaſion to rely on the law for this; for it is clear, that it would not in a court of equity, it being admitted on all hands, and muſt be ſo taken, that this ſettlement was unknown to all the parties: nor did the daughters know of this contingent proviſion, beſide which they had no other proviſion out of this eſtate; and all, they could be intitled to, muſt ariſe out of the perſonal eſtate of their father or other relations. It is impoſſible then to imply within the general releaſe that, which neither party could have under conſideration, and which, it is admitted, neither ſide knew of; and as this releaſe cannot have its effect to bar this demand, ſo it cannot be ſet up againſt them in a court of equity. The only remaining conſideration is, whether Mrs. *Biſcoe* can claim this 2000 *l.* part of the 8000 *l.* and intereſt, and alſo the 1000 *l.* under this deed in 1728; for it is admitted, ſhe cannot claim the 1000 *l.* under the will of her brother *John*, if ſhe has this 2000 *l.* I am a little ſuſpicious, that *John*, when he made that will, had this in view. There is no ground, for what is inſiſted on as a reaſon, why ſhe

ſhould not have both. The demands, this was intended a ſatisfaction for, were any claim out of the eſtate of the mother, brother, and perſonal eſtate of the father: and there is no ground from hence to ſay, the releaſe ſhould be opened, and account to be taken of what theſe demands were. It does not appear, much moved from the bounty of *John*, but rather the contrary, conſidering what ſhe was intitled to under the will of her mother out of her aſſets, *&c.* To what purpoſe then ſhould I ſend it to an inquiry, when it is impoſſible now to take the account, of what was due from the brother to his ſiſter at the time of entering into this deed? *John* is dead; and it does not appear, what of the eſtate of the father, brother, *&c.* came to his hands, and how much Mrs. *Biſcoe* was intitled to out of it. The reſult then is, that they ſtated and adjuſted this as the ſum, that was due from him at that time; what he gave to his ſiſters was not by way of bounty, but ſatisfaction of the ſums due to them; for he made the like deeds to the other ſiſters; ſo that the ſaying, a reaſonable woman muſt have done the ſame, is making a ſuppoſition, that concludes neither way; for a reaſonable man would not have aſked that. If he had been told of this at that time, he would probably have ſaid, that he might ſuffer a recovery, or, if he did not, it was no great matter, let them have it. He never did ſuffer a recovery.

Conſequenely I muſt make a decree for the raiſing and paying this 2000 *l.* with intereſt at 4 *per cent.* and alſo for the 1000 *l.* under the deed of 1728: and in a caſe of this kind, where the incumbrances ſo nearly exhauſt the whole, I will decree an immediate ſale without waiting for the account. But let it ſtand over to ſee, if the mortgagees conſent to an immediate ſale.

Note: *Leighton* v. *Leighton* was cited: where an old intail was created in the reign of *H.*8. The family had acted as abſolute owners in fee; and there had been an inquiſition finding, that ſeveral of the anceſtors were ſeiſed in fee: yet it underwent a long litigation, whether a recovery could be preſumed from the length of time: and after ſeven trials at leaſt, and on proof of the fines being burned, it was preſumed by the jury, that a fine was levied; but not ſufficient to do ſo from their acting as owners.

Caſe 102. Leigh *verſus* Thomas, *June* 19, 1751.

Maſter of the Rolls for Lord Chancellor.

Demurrer for want of parties allowed.

Part of a ſhip's crew appoint two to be agents: on a bill for account the reſt muſt be parties.

BILL for account of prize-money, and to have two ſhares paid to the two plaintiffs as agents; which, they ſaid, they were intitled to under the general articles, on which the cruiſe was ſet on foot; for that, though there was no proviſion at all therein for any appropriation of ſhares to perſons afterward appointed agents, yet it was ſaid in general in the articles, that the crew ſhould have liberty to appoint two agents; that the two plaintiffs were appointed agents by a ſubſequent deed and agreement ſigned by ſixty-four out of eighty, the number of the whole crew. They brought this bill therefore not in behalf of the whole crew, but of themſelves (who were two of the number) and of the ſaid ſixty-four.

Demurrer for not making the whole crew parties.

Againſt the demurrer. There are ſeveral caſes, where on account of the number it is impoſſible, where it will be ſufficient, though all the perſons intereſted are not made parties; as in the caſe of voluntary ſocieties, as the bubbles in 1720; of the commoners of *Tunbridge Wells*, of rights of a fiſhery; of tenant rights in the *North*; in which one alone may bring a bill; ſo where lands are directed to be ſold for payment of debts, though there are ſeveral creditors, one may bring a bill in behalf of himſelf and the reſt, and they are ordered to come in under the decree; ſo of legatees, though but a few, one alone may bring a bill; and in ſeveral other caſes, the court allowing it from neceſſity. Here they may come in under the decree for account.

Sir *John Strange.*

The ſubſequent agreement cannot be conſidered as binding on all the crew in general; for they have ſtill a right to ſay, though ſome particular perſons on any foundation, as generoſity, *&c.* had agreed to give the plaintiffs that particular benefit of having two ſhares on their own account, that not being in the general articles ſubſcribed, they could not be bound thereby; it is impoſſible therefore to have this account taken without bringing before the court the reſt of the ſailors not ſigning that agreement. If made plaintiffs, they could not be warranted to do that without their conſent: then they cannot be added as defendants after the decree, to litigate this particular right ſet up by the plaintiffs, as they would, if made defendants in the original ſuit. So that this

bill

bill being only by the two agents in their own names claiming a particular proviſion for themſelves which they are not intitled to under the general articles, but derived from particular people only, the demurrer is proper. As to the other queſtion of the bill being on behalf of the ſixty-four there mentioned, it is of the firſt impreſſion; being by agents who have no authority to ſue, at leaſt in their own name, as they come into this court, if they had authority to ſue, they muſt bring the Action in Name of the principal. No doubt but a bill may be by a few creditors in behalf of themſelves and the reſt to have an account of real and perſonal eſtate for relief of all; and then the decree lets in all the others; and they are conſidered as Plaintiffs, that bill not being confined to a ſelect number: but there is no inſtance of a bill by three or four to have an account of the eſtate, without ſaying they bring it in behalf of themſelves and the reſt of the creditors: otherwiſe the Executor may account to all the other Creditors in other bills. And though you are to make ſeveral parties plaintiffs, if any die, that does not abate the ſuit; the right ſurvives; as in a joint Action at law it abates not by death of one; the ſurviving plaintiff may ſuggeſt the death of his companion, and that ſuit will not abate. It is impoſſible therefore to have this account taken in the manner it now ſtands. Whether they will be authoriſed to bring a bill in behalf of the whole crew to litigate it, will be for their conſideration: but at preſent it is a new bill by the agents in their own name and claiming a particular right, which they are not intitled to againſt the proprietors in general, and cannot have a decree without the other perſons who have a right to litigate it.

Agents muſt ſue in name of principal.

A few creditors may ſue for themſelves and the reſt; and the ſuit abates not by death of one.

The Demurrer therefore ſhould be allowed.

Thomas *verſus* Britnell, *June* 20, 1751. Caſe 103.

At the Rolls.

JOHN IVY in the beginning of his will recited, that he had made a former will in life of his wife, in which he had given to her all his real and perſonal eſtate; that he had the misfortune to loſe her, and therefore he makes this will for the diſpoſition of the ſame. Firſt, he orders all his debts and funeral charges to be honourably paid after his deceaſe. In a ſubſequent clauſe he deviſes particular premiſes, enumerating them, excepting *H.* and *R.* all which enumerated lands, except *H.* and *R.* he deviſes to truſtees by and out of the money ariſing by ſale, and out of the rents and profits thereof in the mean time, in the firſt place to pay and diſcharge his debts, funeral expences, and

Wills conſtrued for benefit of creditors to charge real eſtate (though not expreſly mentioned) by implication on general words: but that implication may be afterward deſtroyed.

all legacies given by this will or by other writing under his hand. He afterward goes on and ſays, that *H.* and *R.* ſhall be in the firſt place for payment of the legacies mentioned in his will.

Plaintiffs brought this bill as creditors of teſtator to have the real eſtate by the will ſubjected to payment of their debts, in aid of the perſonal, ſo far as that proved deficient; inſiſting that his whole real eſtate was by the will eſtabliſhed as a fund for payment of debts; and whether the whole, or any and what Part, of his real eſtate was ſubject to debts, was the queſtion.

Sir *John Strange.*

The word *ſame* muſt relate to that real and perſonal eſtate before given; and if it had ſtood on that and the word *Imprimis* only, I ſhould have no doubt, but that his whole real eſtate would be ſubject to the payment of debts; not from any expreſs mention made that they ſhould be a charge on his real eſtate, but from that conſtruction the court makes for benefit of creditors, and that men ſhould not ſin in their graves: as in Lord *Warrington's* caſe, where teſtator ſaid, he made his will for the diſpoſition of all his worldly eſtate; *Imprimis* he ordered all his debts to be paid; the Court there put that reaſonable conſtruction on it, that being introduced with the diſpoſing of *all his worldly eſtate*, that ſhould take in lands as well as perſonal eſtate, and the real was therefore ſubject to payment of his debts. Here it is rather ſtronger; becauſe he has expreſsly taken Notice, that there was real and perſonal eſtate. But it muſt be conſtrued farther, as a conſtruction is to be put on the whole frame of the will, not on a particular word. Here is no expreſs declaration in the outſet of his will, that his whole real eſtate ſhould be charged with payment of his debts. Therefore it is neceſſary to look farther into his will and ſee, what was the intent of teſtator, who is not bound in fact, though bound in honour, to make ſuch a diſpoſition for his creditors. Conſidering the whole, he has ſubjected the greateſt, but not every part of his real eſtate to payment of debts, having excepted a particular part and applied it to another purpoſe, not intending that *H.* and *R.* ſhould be liable to be ſwallowed up by creditors to the prevention of the legatees under his will; but afterward directs what ſhall be done with *H.* and *R.* He had perſonal eſtate, he could not exempt from payment of his debts: he had real, the whole or particular part of which he might ſubject. In declaring his intent as to that, he exempts *H.* and *R.* intirely, reſerving them as a fund for legacies only. On the clauſes therefore altogether (and which are the only clauſes by which he expreſly charges his land therewith) he conſiders, how far his real eſtate ſhall be chargeable to creditors,

and then thought himſelf at liberty to apply the other part to ſatisfy legatees. Therefore, though on the firſt part the court might take the whole real to be charged with debts, yet as there is no expreſs lien on the real by theſe general words, and afterward he diſtributes ſuch part of his real for debts, and ſuch for legacies, it is too much to lay hold on the general words to ſay, the whole ſhould be charged with payment of debts. It can be done only by implication on the general words; which may be explained afterward, and that implication deſtroyed. Conſequently the plaintiffs can only have a decree for an account of the perſonal eſtate in courſe of adminiſtration, and then the other parts of the real eſtate except *H.* and *R.* for payment of their debts.

Chicot *verſus* Lequeſne, *June* 21, 1751. Caſe 104.

Award.

If one arbitrator makes improper declaration, he will be made to pay coſts; and ſatisfaction decreed on the judgment on bond of ſubmiſſion. But the fact muſt be put in iſſue, or opportunity to anſwer it.

ON Bill to ſet aſide an award it was inſiſted, the only relief can be in this court, however partial, corrupt, *&c.* the award is; the parties not having proceeded under the ſtatute 9 & 10 K. *Wil. Cap.* 15, which gives a ſummary remedy even to courts of law, provided they purſue that ſtatute: but this is not a ſubmiſſion made an order of any court, and therefore the obligor in the bond cannot defend himſelf at law by ſaying, the award is partial or corrupt. * Then no court of law can give relief: it muſt be in equity, which often ſets aſide awards, and gives that relief ariſing out of the caſe, as by directing accounts, or granting injunctions to ſtay all legal proceedings which had been on the foundation of its being a good award. Though bills of this ſort come with ſome prejudice, as arbitrators are of the parties own chuſing, and in general this court leans very hard againſt them, yet if on partiality it ſhould not relieve, it would give arbitrators too great power, and prevent this expeditious attaining juſtice. The queſtion then is on the merits and evidence on both ſides, whether this award ought to ſtand? Of the three arbitrators, *G*, *Vine*, and *Myhill*, the award was made without the latter hearing it, or having an opportunity of conference to convince the others, or be convinced. Two cannot exclude a third. 2 *Ver.* 514. 3 *Will.* 362. If arbitrators give not ſufficient time, or award upon accounts without looking into them, or will not hear, or but one ſide, a court of law would infer that miſbehaviour mentioned in the Statute in not acting as a fair judge; then this court will go by the ſame rule. It ought to be as fair and open as a trial by jury. Wherever a number by election of the parties are to exerciſe a judicial authority, as it is to be final in the firſt inſtance (almoſt the only caſe where ſo) theſe judgments ſhould

* His Lordſhip ſaid, it would be very ſtrange if there could be no defence at common Law on an Action brought on an award by corruption; but he knew no caſe of that.

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be fairly and openly, or equity will interpoſe. Award without hearing, though juſt, is not good; for it is juſt by accident. If a corporate body is to do a corporate act, not on a corporation day, every member ſhould be preſent; as determined by *Your Lordſhip* in *B. R. Corbet Kynaſton* v. *Mayor of Shrewſbury*, where fifteen aldermen concurring, as found in the verdict, the whole court held it a void act, the ſixteenth not being ſummoned, whoſe reaſon might have convinced the reſt. So wherever powers are delegated. It is in evidence, that at a meeting *Vine* ſaying, "he "would conſider and judge on plain facts", *G.* ſaid "he ſhould "not mind facts, that being convinced Mr. *Letellier* had miſuſed "the *Lequeſnes*, and having it now in his power, he would mulct "his repreſentatives."

Lord Chancellor ſaid, he would require a very particular anſwer as to this fact, before he would let this award ſtand; for no judge, publick or private, ought to ſay ſo.

The anſwers given for defendant were, that they were words of warmth and paſſion, ariſing from the heat of the debate between *Vine* and *G.* and that this was the reſult of his judgment after having entered into the merits. Next this fact was not put in iſſue, there being nothing in the bill relative to it, the charges being only general as to partiality and ſome ſpecial charges as to other matters; ſo that it came into the cauſe by ſurpriſe by depoſitions at the hearing.

LORD CHANCELLOR.

I have not received an anſwer to my ſatisfaction to that, which was ſaid by *G.* the arbitrator, who appears to be the principal judge in this matter; and made this declaration (as it is ſworn) at the only meeting, in which all the three arbitrators met, which was at all material; and which was, if true, declaring a direct wrong, a partial rule of judging, and miſtaking his office; not being an arbitrator to fine the parties, or to go according to his belief only, but according to evidence, ſuch as the nature of the caſe would admit, and decree a ſatisfaction to the parties. Suppoſing they were words of warmth only, they were a declaration made by a perſon who was to judge; and if he carried that heat and paſſion into execution, I ought not to ſuffer it to ſtand. If it was the reſult of his judgment on the merits, it was a partial reſult. It is very near to the caſe of Mr. *Ward* of *Hackney* v. *Periam*, for which I have ſent for the *Regiſter*'s book, *Lib. B. Fol.* 217, 1720. It came twice before the court; and was a bill to ſet aſide an award by *Walker* and *Floyd*, two perſons out of three, (juſt as this is) who joined in making it. It was a reference to put an end to a cauſe long depending, in which an account was before the Maſter. There was a clauſe in the bond of ſubmiſſion, that the ſubmiſ-

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ſion ſhould be made a rule of court on motion of either party. After the award made, plaintiff moved *B. R.* to make that ſubmiſſion a rule of court, and the ſame day moved to ſet the award aſide, which he could not do without its being made a rule of court. A rule was made to ſhew cauſe, why it ſhould not be ſet aſide on partiality and miſbehaviour in the arbitrators. On ſhewing cauſe the court was divided; and ſo the award could not be ſet aſide. Then defendant moved for attachment in not performing the award. The court was ſtill equally divided; ſo no attachment could be; conſequently *Periam* could have no advantage of the ſubmiſſion being made a rule of court, and therefore brought a common action on the bond of ſubmiſſion. Plaintiff brought his bill in this court merely to be relieved againſt the award, praying no other particular relief except the general. There is indeed a diſtinction between the two caſes, that being a reference in a matter in difference in a cauſe before; ſo that if that was ſet aſide, there would be no want of relief, becauſe the account would go on before the Maſter. Defendant by his anſwer inſiſted, that this was determined by *B. R.* and therefore the award ought not to be ſet aſide. It was heard by Lord *Macclesfield*, 21 *April* 1719, who was a little ſtaggered with the proceedings in *B. R.* being an award by virtue of a ſubmiſſion within the act of parliament, and doubted, whether he ſhould enter into it to give relief, when the whole matter was ſubject to the juriſdiction of a court of common law, who had inquired into it, and was not of opinion to ſet it aſide; all he did therefore at firſt, was to refer it to the Maſter, to ſtate what had been done in it by *B. R.* who ſtated as aforeſaid. On this Lord *Macclesfield* was of opinion, there was no determination of *B. R.* either way, not having thought fit to ſet aſide or to affirm the award, becauſe they refuſed the only proceſs to carry it into execution, an attachment; and therefore he held, and very rightly, it was as a bare bond of award without being made a rule of court; and if a court of common law, which had this ſummary juriſdiction, refuſed to exerciſe it, and left the party on one ſide to take relief by his action, it left the party on the other to take relief by bill in equity. Then *Walker* having ſaid, he would make *Ward* pay the coſts (which was relative to the ſuit before the Maſter) it was ſuch a declaration, that though *Floyd*, the other arbitrator, joined in the award, as has been done here, notwithſtanding that, the court decreed ſatisfaction to be acknowledged on the judgment on the bond of ſubmiſſion; and decreed *Walker*, who had joined in this award after this declaration of his, to pay the coſts of the ſuit. This was a very juſt decree, and is a very ſtrong authority as to the general queſtion, unleſs an anſwer is given, which brings it to the other anſwer to this of the fact's not being in iſſue; which

One cannot move to ſet aſide award without being made rule of court.

is conſiderable. It does not appear, that that declaration of *Walker*'s was put in iſſue in that cauſe: and no weight is to be laid on the objection in point of form and regularity; for if a bill is to ſet aſide an award, bond, or deed for fraud, impoſition, partiality, or undue practice, it is not neceſſary in the bill to charge minutely every particular circumſtance; for that is a matter of evidence, every part of which is not to be charged. But notwithſtanding, when the cauſe turns on it, and no notice or opportunity is given to the other ſide to anſwer it, the court ought if poſſible to put it in ſome further method of inquiry. As there has been no opportunity for defendant to examine as to this, and the plaintiff might have examined the other arbitrator, *Mybill* which he has not done, reſting it on the examination of *Vine*, I will direct *G.* and *M.* both to be examined on interrogatories before the Maſter relating to it: but if it ſhould come out, that *G.* did make that declaration, I ſhall follow the precedent, and make *G.* pay the coſts; for notwithſtanding an arbitrator is an indifferent perſon, if the court was not to lay weight on ſuch things, arbitrations would be very arbitrary things indeed.

Caſe 105.

Exel *verſus* Wallace, *June* 22, 1751.

Ante 28 Jan. 1750.

APPEAL from the decree at the *Rolls* upon the ſecond point.

On marriage a leaſehold eſtate ſettled in truſt for huſband and wife for life: after deceaſe of ſurvivor then truſtees to aſſign it with the rents and profits to the eldeſt ſon; for want of ſuch iſſue of ſuch ſon, to daughters. It goes to the only daughter at the mother's death, and not to repreſentatives of a ſon, who died without iſſue in mother's life.

For the plaintiff, appellant. The ſettlement is abſurd, as it now ſtands; and there ſeems to have been a line left out in the ingroſſment, which would have made it ſenſe, the word *iſſue* having no correlate. The intent of the parties was to make a proviſion for a family-ſettlement; an intereſt thereby veſted in *William* the ſon, and ſuch an intereſt as gave him the whole. It is in nature of an executory deviſe, or executory truſt, which ſtands on the ſame foot. It's being *in futuro* will not prevent it's veſting, any more than if it was a limitation of freehold eſtate, there being no difference; *Matthew Manning*'s caſe; for if that is limited to *A.* for life, remainder to his firſt ſon; as ſoon as the ſon is born, it veſts in him, though liable to be deveſted; as if the ſon ſhould die in life of his father, who ſhould leave another ſon, he would be then his firſt ſon; like a limitation for life to a father, remainder to all his children, the firſt child takes the whole, but liable to be deveſted on the birth of other children. But this ſon ſurvived his father, and there never was a ſecond ſon. In general, though perhaps not in all caſes, the conſtruction of truſts and of the limitations of terms by deed is the ſame in a court of equity as of law, that there may not be different rules of

property. Lord *Norfolk*'s caſe, the firſt reſolution. It is veſted abſolutely, not for life only; which would be contrary to law; for there cannot be a limitation to one unborn for life only, remainder over, *Humberſton*'s caſe. But ſuppoſing on the firſt words it might have been a doubt, what the quantity of the eſtate would have been; theſe were articles conſidering the perſons as not in being, ſo that they need not ſtay for their births for the carrying it into execution; and if they had come for that, no intereſt leſs than an eſtate tail would the court have decreed the firſt ſon to take; for the court cannot conceive a deſire to make a perſon unborn tenant for life. Where the limitation is to huſband for life, to wife for life, and to the firſt ſon, without ſome words appearing on the face of the inſtrument itſelf, as to truſtees till the ſon attained twenty-one, or to ſuch ſon as ſhould be living at death of the father and mother, there is no inſtance of the court's reducing the limitation to the firſt ſon merely on account of the nature of the eſtate as being a perſonalty. Though in eſtates of inheritance the want of words of limitation will leſſen the intereſt of the perſon to take, it is otherwiſe of chattels real or perſonal things; for the intereſt of the taker will be increaſed by the want of words of limitation. A copyhold eſtate is alſo compromiſed, in which *William* the ſon would have a remainder in tail veſted in him on his birth, ſuch an intereſt as at a particular age he might have barred, and prevented the limitation to the daughters taking effect. Then the court will ſuppoſe, they intended to veſt as great an intereſt in the other part of the ſettlement, which will give him the abſolute intereſt thereof; for ſuch is the conſequence of intailing a chattel. *Theebridge* v. *Kilburn*, 12 *March* laſt, was ſtronger than this for an abſolute veſting of a term without any ſuſpenſion. In 2 *Bul. Lord Coke* ſays, the law delights in and favours always the veſting eſtates. The ſame inconvenience ariſes in the caſe of every real eſtate, that the eldeſt ſon may on coming of age ſuffer a recovery, and take it away from his younger brother: whereas in the preſent caſe it only bars the daughters. The inconvenience and abſurdity of the contrary conſtruction is much greater, giving it to the daughters notwithſtanding this ſon (who lived till near nineteen) or any other ſon had left iſſue; which might have been the caſe. There is a conſiderable property of this kind; and the ſon coming of age might want to make a ſettlement of it; which could not be, if it was a contingent intereſt till death of father and mother. It is objected, here is the word *then*, which denotes, when this ſhould take effect, and points out the death of ſurvivor, till when the eldeſt ſon ſhall have no intereſt: but that word only points out the time, when the conveyance is to be made, and is a moſt trifling circumſtance to let the intereſt of an eſtate depend on. *Expreſſio*

Ante.

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eorum quæ tacite, &c. and the truſtees would be bound to do that merely by being truſtees. Even in Lord *Beauclere* v. Miſs *Dormer* there was the word *then* in the will, and ſtreſs laid thereon for the ſame purpoſe to tye it down to a particular point of time ſo as to deſcribe a ſon living at time of the death: Your Lordſhip held it incapable of that ſenſe, and as the reſt of the will had meant at any time, *then* would make no alteration. In *Theebridge* v. *Kilburn* a much more ſignificant word, *immediately*, Your Lordſhip did not think of conſequence to make a real variation in the ſenſe. The direction to the truſtees to aſſign will make no difference; for all truſts are more or leſs executory; and it is now to be taken, that there is no material difference in point of limitation, whether it is executed or executory, as whether it is in truſt to *A.* for life *&c.* or in truſt to convey; which is the ſame thing, being truſtees both for the profits and alſo to convey the eſtate.

For defendants Wallace and his wife. This is a particular caſe, and a queſtion of conſtruction peculiar to this deed; for if on the one hand defendants claim under the limitation of an eſtate after an eſtate tail to another, it is clear, they cannot have it: but if they claim on a contingency, which neceſſarily muſt happen within the compaſs of a life or lives in being, they are intitled to it: ſo that the law is clear, when the queſtion of conſtruction is once eſtabliſhed. It ariſes on the conſtruction of the limitation of the truſt of a term; which is to be conſtrued in the ſame manner as an executory deviſe of a term. 1 *Ver.* 234. It is alſo made by a father for a proviſion firſt for ſons, then for daughters, of the marriage; and in that light is intitled to all the latitude and benignity of conſtruction, the court can give it; and alſo becauſe it is on articles, and a truſt to be executed by an aſſignment. There is indeed weight in the argument of no ſenſible diſtinction between truſts executed and executory. That only proves, that truſts executed are intitled to the ſame latitude of conſtruction as executory: but it cannot be thence argued, they are to have a greater. This is on a truſt not executed, but which according to that diſtinction is allowed the utmoſt latitude. It is not to be wondered at, if the father did not take in all poſſible caſes in ſuch a ſettlement as this. It is only a ſettlement of part, which proceeded from the bounty of the wife's father, nothing moving from the huſband in this ſettlement; and there was another ſettlement referred to, by which a jointure was made on the wife; ſo that it is only a partial addition, not the great proviſion. An argument is drawn from copyhold being in this as well as leaſehold: though by operation of law, words applied to copyhold may have a different conſtruction from words applied to leaſehold, yet plainly in the intent of the parties they did not know that,

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but meant, the copyhold ſhould follow the leaſehold; becauſe it was only a ſmall cottage and few acres, part of this very farm; is therefore limited in the ſame manner and by words proper only to the leaſehold, *viz.* to *William*, his executors and adminiſtrators. But if they did know the difference, it is not material; for in *Forth* v. *Chapman* the ſame words had a different conſtruction as applied to real and to perſonal eſtate; and that on ſolid principles, to give way to the intent of the parties as far as poſſible, preſerving the rules of law, and avoiding all the inconveniences thoſe rules were eſtabliſhed to prevent, *viz.* perpetuities, and to be *aſtuti* in ſo doing. On the ſame principle in a limitation over after a dying without iſſue is the extended conſtruction made as to freehold, and the confined as to perſonal, eſtate. Therefore in all caſes of wills, truſts of terms, &c. the court, if it can find words, will ſupport the limitation over, becauſe it was intended. But where there are no words, the court cannot alter the rules of law, and that was *Theebridge* v. *Kilburn*, which was like Miſs *Dormer*'s caſe, there not being a ſingle word to tye it down to a dying without iſſue in the compaſs of a life in being, and the court could not reſtrain it by an abſolute ſuppoſition. In one of the caſes a ſtreſs was laid on the word *leaving*; in *Pinbury* v. *Elkin* on *then*; and ſeveral other words have been laid hold on. In this deed a perpetuity was never intended; for the perſons to take after the eſtates for life of huſband and wife were to take abſolutely; and there never was to be a limitation over grafted on it, the limitations over being on the contingency of their not taking. The truſtees were to aſſign to ſome perſon, who was then to anſwer the deſcription, and to take it abſolutely. By the plaintiff's conſtruction if a ſon had been born, who lived a very ſhort time, the whole truſt would veſt in him, and go on his death to his father, and ſo the daughters would be cut out: and though it may be ſaid, there is no hurt in that, as the father might give it to whom he pleaſed, the ſettlement goes on another ſuppoſition, not truſting the father; for they would not have made ſuch a ſettlement, if they had truſted to his generoſity. The words ſay, *the eldeſt ſon*; then there muſt be a time, when it is to be judged, who is the eldeſt within the meaning. Plaintiff ſays, the moment a ſon is born. Defendants ſay, the time when the truſtees are to execute the truſt. Eldeſt was never tied down to mean firſt born. In *Lomax* v. *Holmden* Your Lordſhip held it ſynonymous to firſt ſon for the time being, who ſhould take. Any ſon then eldeſt at death of ſurvivor would anſwer that deſcription. In all caſes of ſettlements with a view to portions or proviſions for children deſcribing them as ſons or daughters, eldeſt or youngeſt, the court waits till the time to ſee, who will anſwer the deſcription; as in Lord *Teynham* v. *Webb* Your Lordſhip held, the time was the commencement of the term in poſſeſſion. It is admitted, that

1 Wil. 663.

1 Wil. 563.

Ante 22 July. 1749.

Ante 2 Mar. 1750-1.

if there were other ſons, it would have gone to the ſecond born; which ſhews, the time to ſee, who is to take, is not the birth of the firſt; then it muſt be the death of the ſurvivor. It is ſaid, it might deveſt; but that is impoſſible of a perſonalty. The inſerting a line, ſuppoſed left out in the ingroſſment, would make it a new deed: but it is quite otherwiſe: it is to go to the eldeſt ſon without words of limitation. The blunder here is only from endeavouring to be more particular. He might have uſed either for *want of ſuch iſſue*, or *ſuch ſon*, and there is ſenſe in it. Whoever is eldeſt ſon then, ſhould have it: if none, then to the daughters. It is ſaid, he has not thought of the iſſue the ſon might have, and dye in his father's life: but he has not thought that a probable caſe, nor of providing for grandchildren: that will not overturn the conveyance, nor is it the preſent caſe.

LORD CHANCELLOR.

This has been ſaid on the part of defendants to be a particular caſe not falling under the deciſion of any former precedent: for plaintiff the contrary is ſaid, and that it is to be governed by general rules and general precedents. I am of opinion, this is a very particular caſe; and though to be governed undoubtedly (as all caſes whether general or particular are) by the general rules of law and equity, and the natural inferences from thence, yet is it a caſe not like any one precedent and determination mentioned, and therefore the counſel on both ſides are not able to cite any coming up to this. The general queſtion is on the right to this leaſehold, and depends on this, whether the truſt of this eſtate was veſted in *William Oxford* ſo as to be tranſmiſſible to his repreſentative at the time of his death? Plaintiff inſiſts, it was, and that it became part of his perſonal eſtate: the other ſide, that it was not, but only a contingent intereſt that might or might not ariſe on an event, which has not happened: which depends on the conſtruction of theſe articles. This is a particular caſe, firſt becauſe this is plainly not the principal marriage ſettlement on this marriage; for there was another made by and moving from the huſband, taken notice of in this very deed. This was additional by the wife's father for benefit of the family; conſequently it is not neceſſary in caſe of ſuch a ſettlement to make ſuch a conſtruction, as ſhould provide for all the iſſue of the marriage in ſucceſſion, who were provided for by the other. The next conſideration is, that here is a different direction and different kind of declaration of truſt in the caſe of the father and mother, and of the eldeſt ſon and daughters. An argument is uſed upon the diſtinction between truſts executed and executory; and defendants would take advantage of its being

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an executory truſt as to the iſſue, and the truſtees directed to convey. The other ſide contend, that it is out of the queſtion, and allude to what, I ſaid in *Bagſhaw* v. *Spencer*. I did not there ſay, no weight was to be laid on that diſtinction, but that if it had come recently before me, I ſhould then have thought, there was little weight in it: but that I ſhould have that deference for my predeceſſors as not to lay it out of the caſe: not intending to ſay that all, which my predeceſſors did, was wrong founded; which, I deſire, may be remembered. This is neither of thoſe caſes, and is ſpecial therefore in that reſpect. Here is a different and diſtinguiſhed declaration of this truſt. He has made it, what is called a truſt executed during life of the father and mother, the eſtate being veſted in truſtees to permit them one after the other to receive the profits during their lives: not going on afterward in that form, but that the truſtees ſhall then aſſign the term to the eldeſt ſon of that marriage: ſo that it is a mixed caſe, and ſeems by penning it in that manner to have a different intent from the common caſes; therefore I am of opinion, that during life of father and mother none could call for an aſſignment of this term, the legal eſtate being intended to remain in the truſtees: in that reſpect therefore it is very like the caſe happening in the moſt uſual and ſkilful method of ſettling terms on marriage ſettlements by conveyances; *viz.* to veſt the term in truſtees, then to declare the husband to be permitted to receive the rents and profits during life, afterward the wife to do the ſame if intended to be her jointure, and afterward to aſſign the term to ſuch ſon as ſhould firſt attain twenty-one: the reaſon of which is, that if they did it otherwiſe, they could not carry on the limitation to the ſubſequent ſons, and therefore direct that no conveyance ſhall be of the truſt of the term for benefit of the ſons of the marriage, till the firſt ſon attains twenty-one. There is therefore a plain difference from the penning of this truſt, making it executed (as it is called) in life of the father and mother, executory afterward. But it is inſiſted, whoever was firſt ſon, the term would veſt in him on his birth; for it muſt be admitted, there is no way to make it veſt if not on birth of the firſt ſon. If then that ſon dies, it ſhall go to his repreſentative, which is the father, if he is not capable of diſpoſing of it. The other ſide contend for a ſuſpenſion until death of the father and mother, and then that it ſhould be aſſigned to ſuch perſon, as ſhould be eldeſt ſon at death of ſurvivor. But it is ſaid, the conſtruction of the truſt ſhould be the ſame as of the legal eſtate, and that will make the intereſt veſt, though not in fact in poſſeſſion, which only will be ſuſpended. That is the common conſtruction, where the words and intent of the parties require it: but in this caſe there is beſide attending it, a direction to aſſign together with the rents, iſſues, and profits; which has not been obſerved on; and which ſhews an intent, that the

Ante 12 Nov. 1748.

Truſts executal and executory.

the conveyance ſhould not be made to that eldeſt ſon, until he was intitled to thoſe rents and profits; for they had in view, that if the father and mother both died, and the conveyance could not be made immediately, the truſtees ſhould then aſſign with the profits accrued from their death; which ſhews the intent, that no child ſhould be intitled under the truſt of this term to any intereſt in the eſtate until intitled to the rents, *&c.* for which he ſhould be able to call at the ſame time, as he could call for a conveyance, which could not be immediately on his birth. This truſt ſpeaks another thing; that the aſſignment ſhall be made to that eldeſt ſon deſcribed there at ſuch time, as he was intitled to the rents and profits of the eſtate, which could not be until death of the ſurvivor of father and mother. But great inconveniences are objected from this. It cannot be denied, that ſome may be ſuggeſted from the conſtruction on either ſide: for plaintiff it is ſaid, that from defendant's conſtruction, if two or three ſons are born, and died in life of their mother, leaving children, their iſſue would be deprived of the benefit of the truſt of this term. The inconvenience ſuggeſted on the other ſide is, that if a ſon is born, who lived but a week or a day, the whole truſt of it would veſt in that ſon, and go on his death to his father, by which the daughters would be cut out. But really in the view of the parties the inconveniences, ſuggeſted on defendant's ſide againſt plaintiff's conſtruction, are the greateſt, *viz.* the cutting out thoſe intended to be particularly provided for by this deed, the daughters, rather than the cutting out the iſſue of the eldeſt or other ſon. So might his father do; for their conſtruction will not make the eſtate go to the iſſue of that eldeſt ſon; for he takes the truſt of the whole. It is not neceſſary to go like the caſe of a limitation of real eſtate in a marriage-ſettlement. But this is very little more inconvenience in reſpect of an eldeſt ſon, than that inconvenience which ſometimes ariſes from ſuch limitation of terms in marriage-ſettlements, as I have before mentioned. In that caſe it may be ſuggeſted, there might have been an elder ſon, who lived until twenty-one, married, and left children at his death, who by this declaration of truſt may be cut out: yet that may frequently happen from this method invented by the conveyancers. They ſeem to have had ſomething of that kind in view, only expreſſing it aukwardly and incorrectly, that it ſhall be aſſigned to the eldeſt ſon, not ſaying at twenty-one, but ſtill meaning that ſon who ſhall attain the time of receiving the rents and profits. On the whole therefore the intent of the parties was, that this ſmall leaſehold eſtate, which moved from the wife's father, and ſettled collaterally to the principal ſettlement, ſhould be a proviſion for ſuch ſon, as ſhould be eldeſt at death of ſurvivor; at which event the aſſignment ſhould be made to him, and not before; and he would be then intitled to call for the rents and profits of the eſtate; which right was to meet and concur at the ſame time as the right to call for

the conveyance. If indeed there was no ſon at that time, they ſhould convey it to daughters if in being. It is not a remainder attempted to be limited on this truſt of a term: but like *Loddington* v. *Kime*, which, the court ſaid, was not an attempt to mount a fee on a fee, but a fee-ſimple with a double aſpect: ſo here is a truſt of the whole reſidue of the term with a double aſpect; in one event, if there is an eldeſt ſon, the whole truſt of the term to be conveyed to him; if not, to the daughters. This manifeſtly in the event as it happened, anſwers the intent of the parties; and the leaſt inconvenience will ariſe, as this tends not to make the eſtate go back to the father to the defeating the perſons intended to be thereby provided for. It is objected, that here is copyhold included, which is covenanted to be ſurrendered; but that is in ſome meaſure begging the queſtion: for if this is the true conſtruction of this agreement, the copyhold ought to be ſettled in that manner. Why might not the copyhold be intended to be ſettled to ſuch perſon, as ſhould be eldeſt ſon at death of the ſurvivor; which would be a very good contingent remainder, and not void at law? But ſuppoſing it otherwiſe, it is within the caſes of *Forth* v. *Chapman* and Ld. *Glenorchy* v. *Boſville*; which will warrant the making a different conſtruction; the ground being that though freehold and leaſehold are compriſed in the ſame form of words jointly, yet the court may put a different conſtruction according to the nature of the caſe and to anſwer the intent; which if right in thoſe caſes, why not ſo here?

1 Wil. 663. Tal. 3.

A different conſtruction on the ſame words according to the nature of the eſtate.

I am therefore of the ſame opinion with the *Maſter of the Rolls*, that this is gone over to the daughters, not to go according to the ſtatute of diſtribution; and the decree muſt be affirmed.

Gaſon *verſus* Wordſworth, *July* 3, 1751. Caſe 106.

MOTION to direct depoſition of witneſſes, taken originally *de bene eſſe*, to be read in chief.

Poſt, 11 July.

For defendant it was ſaid, though this was allowed, where the witneſs cannot be come at for a ſecond examination, yet here was not an abſolute impoſſibility of having an examination in chief; which is always neceſſary. An examination was now depending in *Sweden* on a commiſſion ſent over for that; and though the King of *Sweden* refuſed the executing the commiſſion, requiring it to be by ſome magiſtrates there according to the laws of *Sweden*, it was the plaintiff's fault, that it was not granted, by his not joining properly in the petition to that court.

Depoſitions *de bene eſſe* publiſhed, where no examination in chief can be.

Lord Chancellor ſeemed ſurpriſed at this refuſal between two trading countries, which might be dangerous to commerce. If any particular ceremony was required by that foreign court, this court would go great lengths in caſe of neceſſity; but then that neceſſity muſt be made out: let the motion therefore ſtand over, that plaintiff may give an anſwer to that fact.

Caſe 107. Flower *verſus* Herbert, *July* 4, 1751.

Injunction until hearing to action by bankrupt againſt aſſignees.

MOTION for injunction to ſtay proceedings in action at law by defendant a bankrupt.

LORD CHANCELLOR.

This is a matter, I have hardly known to have come in queſtion before, it is a firſt inſtance of the kind; and not neceſſary now to determine, that this ſhall not be tried at all, but only whether the defendant ſhall proceed in this action until the matter has been farther conſidered in this court. I will not encourage bankrupts to proceed in an action, if reaſon appears to ſtop them, or the matter to be farther conſidered in this court; for if a commiſſion is taken out under the act of parliament, the bankrupt himſelf ſubmitting to the whole proceeding, and the application to this court by the bankrupt, whether in the name of himſelf or another, and at a diſtance of time an action is brought by the bankrupt himſelf againſt the aſſignees, I do not know, who will accept to be aſſignee under a commiſſion of bankruptcy: which makes it a matter of great conſequence, if it ſhould be open ſtill to him to bring an action notwithſtanding his acquieſcence. It is true, the acts of parliament being very perilous to bankrupts, it is reaſonable for a man, who may believe, he is no bankrupt, to go before the commiſſioners ſubmitting to them for the time, yet ſtill proteſting that he is no bankrupt, he may notwithſtanding bring an action in proper time: though this is pretty ſtrong to do after ſurrendering, ſubmitting to be examined by the commiſſioners, and going through all that proceſs: yet that, I agree, would not bind him, but he might bring an action. But in this caſe he does not think fit to bring this action then, but a year and a half after. He himſelf petitioned in the name of another creditor for new aſſignees, which is the ſame as if in his own name, amounting to a ſtrong admiſſion that the proceedings under the commiſſion were right: there cannot be a ſtronger: yet now is this action of *trover* brought by him againſt the aſſignees a year and a half after, and may be as well done by him ſeveral years after if not within the ſtatute of limitations; and then in what a condition are the aſſignees? If a decree is made for

execution of a truſt, and a defendant thereto attempts to controvert that at law, this court will grant an injunction: this is much of the ſame kind. It is true indeed, that an act of this kind under the great ſeal is not equal to a decree of this court; I would not be underſtood to mean that, being by virtue of a ſummary juriſdiction veſted by act of parliament in the *Lord Chancellor*, and therefore differs from the general authority of *Lord Chancellor*: but however it is very analogous to it, and this is what is not to be blown over ſlightly. And how are they to have coſts? Out of their own eſtate and effects; that is the conſequence. Beſide the debt of the petitioning creditor ariſes on account; which, I do not know, how it can be determined without taking that account; and which cannot be taken in action at law. Under all theſe circumſtances therefore I ſhall not let this action proceed to trial immediately. Perhaps, when it comes to a hearing, the court may think fit to let it be tried by action or iſſue; but ſtill the court ought to lay hold of any thing to prevent this: for if allowed, any litigious bankrupt may do this from time to time. Let an injunction therefore be to the hearing, and plaintiffs ſpeed their cauſe.

A debt on account, though not liquidated, is a foundation for commiſſion of bankruptcy.

Debt on account, foundation for a commiſſion.

Attorney General *verſus* Middleton, *July* 4, 1751. Caſe 108.

Charities.

INFORMATION againſt the maſter and governors of a ſchool upon the general principle of the power of this court to call the truſtees to account, as having the general ſuperintendency of all charitable donations and truſts.

Viſitatorial power not to be extended, being ſummary and arbitrary: but a free ſchool founded by charter with proper powers muſt be regulated as by charter, not in this court, as where no charter.

Two general queſtions ariſe. Firſt, whether it is properly brought as to the general juriſdiction of this court; and whether, ſuppoſing a ground of complaint, there were not proper officers or viſitors to take conuſance thereof? Next, ſuppoſing that out of the caſe, and that the court had clearly a juriſdiction, whether there is ſufficient ground on the evidence to give the relief prayed?

LORD CHANCELLOR.

By the evidence on the part of the relator it ſeems, that this information, though with a plauſible appearance on the face, is upon as ſlight grounds and as wrong motives, as ever were known.

As to the firſt queſtion, I am of opinion upon the nature of this foundation, that it is not proper; and that the rectifying and regulating, what is wrong in the exerciſe of the power of this charity, ſhould

ſhould have been in another method of proceeding. I am not a judge diſpoſed and inclined to extend viſitatorial powers; becauſe they are ſummary and arbitrary (in a reaſonable and juſt ſenſe of the word) and therefore liable to abuſe. But notwithſtanding if it is in any caſe proper, that ſuch juriſdiction, if founded in law, ſhould receive allowance, it is certainly in the caſe of a ſmall grammar-ſchool with an endowment originally of 50*l.* only in the charter, and now at this diſtance of time but little above 80*l.* Conſider the nature of this foundation: it is at the petition of two private perſons by charter of the crown; which diſtinguiſhes this from caſes of the ſtatute of *Eliz.* on charitable uſes or caſes before that ſtatute, in which this court exerciſed juriſdiction of charities at large. Since that ſtatute where there is a charity for the particular purpoſes therein, and no charter given by the crown to found and regulate it, unleſs a particular exception out of the ſtatute it muſt be regulated by commiſſion. But there may be a bill by information in this court founded on its general juriſdiction; and that is from neceſſity, becauſe there is no charter to regulate it, and the King has a general juriſdiction of this kind: there muſt be ſomewhere a power to regulate: but where there is a charter with proper powers, there is no ground to come into this court to eſtabliſh that charity; and it muſt be left to be regulated in the manner, the charter has put it, or by the original rule of law. Therefore though I have often heard it ſaid in this court, if an information is brought to eſtabliſh a charity, and praying a particular relief and method of regulation, and the party fails in that particular relief, yet that information is not to be diſmiſſed, but there muſt be a decree for the eſtabliſhment: that is always with this diſtinction, where it is a charity at large or in its nature before the ſtatute of charitable uſes, but not in the caſe of charities incorporated eſtabliſhed by the King's charter under the great ſeal, which are eſtabliſhed by proper authority allowed. Q. *Eliz.* granted a charter, which amounted to a licence in the firſt inſtance to found a free ſchool and alms-houſe. Then the Queen founded them. It was at the petition of *Heath* and *Gilpin*; the latter of which was the great apoſtle of the *North*, and did a great deal of good, being very ſtrenuous for the reformation. The governors had a power to appoint and to remove the maſter and uſher, and to do every other matter as was neceſſary and expedient for the ſcholars, *&c.* a very large and full power: but over and above that there is a controul placed over the governors, a power being reſerved to the heirs of *Heath* and ſucceſſors of *Gilpin* as rector of *Howton*, to appoint governors from time to time, and to remove thoſe governors as often as found convenient. What is the reſult? whether either the governors or the heir of *Heath* has a viſitatorial power over this ſchool? It has been determined, and expreſſly in the caſe of *Birmingham ſchool*, that there is no technical form of words for granting a viſitatorial power, but it may be by any words ſhewing that

Where no charter, information for charity not diſmiſſed tho' the relief prayed fails: otherwiſe where a charter.

2 Wil. 325. No technical form for granting viſi-

that meaning; therefore it is held there, that the very appointment of governors of an hoſpital will give that power. This is as large a power as can be given, but it is ſubject to ſome controul; and viſitatorial power may be divided, one ſet of viſitors to one purpoſe, and another to another purpoſe, as in ſeveral colleges, and as was held in that great queſtion of *Trinity College* as to the biſhop and the crown. The reſult then is this: if it had reſted ſingly on the power given to governors, I ſhould be of opinion, the governors were viſitors. But it is objected, that here the eſtate and revenue is veſted in the governors, and then they cannot be viſitors, becauſe they cannot viſit themſelves. That is a material objection, and was ſo held in the caſe of *Sutton* v. *Colfield*, becauſe they might miſapply the revenues: but it is never held, that governors cannot be viſitors becauſe merely the legal eſtate of the charity veſted in them. It is the very caſe of *Sutton's Hoſpital*, 10 *Co.* 31. which is founded juſt as Q. *Eliz.* did in this caſe. What they went on there, was, that the veſting the legal eſtate of the corporation in the governors was not ſuch, as would exclude from the right of governing and viſiting; for none of the money could come to the hands of the governors: though if they had been to receive the rents and profits, and to apply them, that might have been of another conſideration, and might exclude them. Here theſe governors have only the legal eſtate in them, not receiving the revenue, which the maſter does from time to time, and accounts for it; which brings it to that caſe. In another reſpect indeed this differs from that, that here is another ſuperintendency over thoſe very governors; and a viſitatorial power may be divided. If then the governors are not viſitors, the heir of *Heath* and ſucceſſor of *Gilpin* are certainly viſitors; and the power to remove governors includes every thing. It is clear therefore, that this is a foundation of the ſame nature with that of *Birmingham* ſchool. The viſitatorial power is either by the governors themſelves or in the heir of *Heath* and ſucceſſor of *Gilpin*, who meant to veſt the whole power in his ſucceſſor to the rectory. As to what is ſaid relating to this information complaining of miſapplication of the revenue by the governors, which is a miſbehaviour, they cannot correct, there is no weight in that objection; for there is no complaint of the governors applying any thing of it to their own uſe; no court of equity therefore would decree them to pay that money out of their own pocket backward, but will only regulate for the future, which is by removing thoſe governors. This is clearly not a caſe within the ſtatute of charitable uſes, but excepted out of it; for this is a free ſchool, which has ſpecial governors appointed by the founder. It is true, that an information in name of *Attorney General* as an officer of the crown was not an head of the ſtatute of charitable uſes, becauſe that original juriſdiction was exerciſed in this court before: but that was always in caſes now provided for by that ſtatute, that is charities at large, not properly and

tatorial power. It may be divided.

Veſting the legal eſtate of a charity in the governors, excludes not from being viſitors, as where they are to receive the revenue.

regularly provided for in charters of the crown. On the whole of this point therefore I am of opinion, this information is improperly brought in reſpect of the juriſdiction; and certainly there are ſomewhere viſitors of this charity; for the proper place to apply for miſbehaviour would be to the governors. If they refuſed, it would be a miſbehaviour; and then application ſhould be to the rector, &c. to remove them, and appoint others.

But the next point deſerves to be conſidered: as to which the firſt and principal relief prayed was to remove this maſter as not qualified by the ſtatutes, and appoint another. There is no ground for the court to interpoſe for that purpoſe in the firſt inſtance. No application has been made to the governors to remove the maſter; which they have expreſs power to do preſcribed by the charter. That would be going *per ſaltum*, and an improper way: ſo that if the viſitors were out of the caſe, it ſhould not come to this court but on the groſs miſbehaviour of the governors. Next it is ſaid, the governors have made an improper election; for which the ſtatutes are produced. There is no name of the perſon giving theſe ſtatutes; and no date. It is pretty odd to come to this court to execute ſtatutes of a private foundation under a charter; of which I never knew an inſtance: nor do the ſtatutes appear to be obſerved in any one inſtance. I muſt preſume a repeal of them; and a court of law would do ſo on evidence to a jury; for the rule of law is, that a corporation has power to make by-laws. A court of common law will direct a jury to find a by-law; and on account of non-obſervance will preſume a ſubſequent by-law to repeal and alter. That is the nature of the caſe; and it would be ſo at law. Then ſhall I enter into that after this length of time? Nor are the qualifications required by the ſtatutes ſuch, as this court would make a ſtrain for. As to the application of the revenue thereby to the ſcholars, it ſeems to be arbitrary according to the ſound diſcretion of the governors, as they ſee cauſe: but things and times have been altered ſince that; for though at the reformation greater invitations were made to bring the poor to ſchools, that is not ſo proper now, for at preſent the poor had better be trained up to agriculture. So that it would be to no purpoſe to decree the governors to pay this trifle of 7*d. per* week, as the ſtatutes require, to the poor ſcholars; for it would not be ſufficient for them: nor ſhould I make a decree for the governors to carry this into execution, if the firſt point was out of the caſe.

Statutes of private foundation under a charter, not executed in this court.

Repeal of ſaid ſtatutes preſumed.

So of a by-law.

The poor to be trained to agriculture, rather than to ſchool.

There is no ground therefore on either point to give relief; and this information ought to be diſmiſſed, and that certainly with coſts; becauſe it appears to proceed from a private motive of revenge in the relator, and that from a very improper cauſe.

Coſts.

Blunt *verſus* Cumyns, *July* 8, 1751. Caſe 109.

ARTICLES were framed to raiſe money in fitting out the *Royal Family* privateers; and thirty ſhares remained unſubſcribed at the time of the capture of the great prizes brought into *Kingſale*. The diſpute now was, whether defendants the managers, who ſubſcribed for thoſe thirty ſhares after the capture, had an excluſive right thereto, or whether the other ſubſcribers (the plaintiffs) were to be let in with them?

Shares in privateers ſubſcribed by managers after a capture; other ſubſcribers excluded.

Lord Chancellor determined in favour of defendants. The other ſubſcribers purchaſed no more than the ſhares, they paid for; and, if a loſs had enſued, would have born it only ſo far; and therefore could be no farther gainers: then the maxim muſt take place, *qui ſentit commodum, &c.* Though the defendants ſubſcribing for thoſe thirty ſhares afterward did not give any new right, yet it could not take away any right, the managers had before. But as the doing that might give occaſion to litigate this matter, the bill ſhould be diſmiſſed without coſts.

Lord Chancellor held, that parol evidence examined by plaintiffs as to theſe articles, but not called for, might be called for by defendants. At law where a witneſs called by the other ſide proved a matter by parol, which was in writing, and proper to be proved in writing, and it tended to the advantage of the adverſe party, it was held, that being a witneſs called by them, and examined by themſelves, it ſhould be admitted as evidence: though it would not, if it had been called on the other ſide: of which there was a caſe in the time of *Holt* C. J. In all mercantile contracts or adventures the articles are commonly extremely ſhort; and where a doubt ariſes about them, the uſage and underſtanding of merchants is read thereto; and is conſtantly ſo at *Guildhall*.

Parol evidence on one ſide called for by the other.

So at law, though to prove matter in writing.

On mercantile contracts evidence of merchants allowed.

Worſley *verſus* Earl of Granville, *July* 9, 1751. Caſe 110.

BY marriage ſettlement of Sir *Robert Worſley* a limitation for life to him and afterward to his wife: next a term of 500 years, the truſt of which declared, if no iſſue male, or if there was, and they ſhould all die without iſſue male before 21, and there ſhould be one or more daughter or daughters, then to raiſe 10000*l.* *Proviſo* that if Sir *Robert* ſhould have any ſon by his wife, that ſhould have iſſue male or attain twenty-one, then the term ſhould

Portions.

Marriage ſettlement on huſband and wife for life, and truſt term if no iſſue male, or if all ſhould die without iſſue male before

twenty-one, to raiſe portions for daughters, &c. A ſon attained twenty-one, but died in father's life without iſſue male. The portions not raiſeable.

ſhould ceaſe: maintenance to be raiſed and paid at the age of eighteen after death of Sir *Robert*.

There was iſſue a ſon, who lived until thirty, married, and made a ſettlement, but died in his father's life without iſſue male.

Defendant, as repreſentative of a daughter, claimed 5000*l.* part of the ſum.

For plaintiff. The meaning was, that if there was no ſon ever living to take the benefit of the limitation in tail to him by this ſettlement, then this portion ſhould ariſe to the daughters; otherwiſe not: therefore the daughters are not intitled in the event that happened. This depends on the events in the family; and the commencement of the term, whether on death of the father or any other time, cannot vary the caſe.

For defendant. This ſettlement, made in purſuance of articles, ſhall have as liberal a conſtruction to favour the general intent to provide for daughters as well as ſons of the marriage. The wife's portion is generally made the ſettlement for younger children: but this is not made in the common method, as there is no proviſion for younger children in general: and it is particular, that though it is a proviſion for daughters only, which generally ſucceeds the limitation to the firſt and every other ſon, this term is preponed thereto. By the argument for plaintiff this ſettlement ſhould have no effect, nor any portion at all raiſed, becauſe there was a ſon, who attained twenty-one; but the term was not to commence until after death of Sir *Robert*, and nothing was to riſe until it commenced, nor could the contingencies before be material. As all the iſſue male died in life of Sir *Robert*, whether they had or had not iſſue male, or whether they died under twenty-one, is immaterial to the queſtion, whether the eſtate ſhall be charged or not with portions. Beſide this conſtruction is pointed out by the direction for maintenance; which it is unnatural to raiſe in the father's life. The latter words before twenty-one are to be rejected or diſregarded. *Corbet* v. *Maidwell*, *Sal.* 159. but if that is too hard to ſay, *Gerrard* v. *Gerrard*, 2 *Ver.* 458, and *Greaves* v. *Madiſon*, 2 *Jo.* 231, prove, that words in a ſettlement may be ſo conſtrued as to anſwer deſign of the parties. Here the taking it in a literal ſenſe deſtroys part of the deſign, plaintiff's conſtruction making the term nugatory and of no effect. It is not extraordinary to conſtrue it to take effect from the commencing in poſſeſſion: courts of equity, and even law, are very favourable in conſtruction of terms for years for younger children, who, though not creditors, are next to, and as creditors, againſt all except creditors. Defect of ſurrender of copyhold, or livery is ſupplied for them as well as creditors. Even at law, words

are

are taken contrary to their true import to raiſe portions, 1 *Lev.* 35. 1 *Sid.* 102. the term being to anſwer the intent adjudged to riſe, though in words it was not to riſe. That is the preſent caſe, *viz.* if the ſons of this marriage ſhould not inherit this great eſtate, but it ſhould go out of the family-line, the daughters ſhould have their portions. Courts of equity have made greater ſtrides for this purpoſe than in any other caſe, poſtponing an eſtate tail to the term, which was ſubſequent, to anſwer the intent. There is great uſe in ſuch a clauſe of ceaſing as here inſerted, the conſtant practice being now that if a term for years is declared to ceaſe on the truſt being performed, and there is a long period of time, it has been determined, that it has ceaſed, and judges have directed the jury to find it ſo.

LORD CHANCELLOR.

I ſuppoſe this queſtion is brought for the judgment of the court, becauſe it is neceſſary to bring a bill for performance of the truſt, and, the term being in truſtees, for an aſſignment of the term, *&c.* but there does not appear any doubt of the right of the caſe on the queſtion raiſed on the conſtruction of this ſettlement and truſt of this term. Whatever the meaning of the parties was, (though I have no doubt of their actual intent) if they have uſed ſuch expreſs and poſitive words in the contingencies put, as that the court cannot put another conſtruction upon them without directly contradicting the words and making a new ſettlement, the words muſt prevail. From what appears from the words of the ſettlement and the plain meaning of them, the daughter of Sir *Robert* or her repreſentative, is not intitled in the event, that has happened, to have this ſum raiſed under the truſt of this term; firſt on the words of the ſettlement and declaration of truſt of the term; next on what might be the probable meaning and intent of the parties in making this proviſion, which undoubtedly is not the uſual proviſion in marriage-ſettlements.

As to the firſt it is true, the truſt of this term is preponed to the remainder to the firſt and every other ſon of the marriage: but that will not influence the conſtruction of the truſt of the term or the contingencies put therein: for it often happens, that terms are ſo limited without neceſſity. In ſome terms ſo limited there have been double declarations of the truſt thereof; if there ſhall be iſſue male of the marriage, to make a proviſion for younger children; if no iſſue male, for daughters: yet that is inartificial. However it is done in that way; (as I have ſeen it) ſo no inference from thence. As to the caſe put of the court's rectifying the placing the term, it has been done in another caſe; where a mere blunder has been in the maker of the ſettlement, the court has relieved againſt it, by preponing

Where a miſtake in placing a truſt term is rectified.

preponing and altering the place of the term, which the court took to be plainly contrary to the intent: that was on a mere miſtake, which is not like this caſe. It reſts then on the declaration of the truſt of the contingencies therein: than which there cannot be plainer. The words are put generally, indefinitely, and are not reſtrained to any time. It is inſiſted, they are to be conſtrued, as if the words inſerted, *if there ſhall be no iſſue male at death of Sir Robert.* If the plain ſenſe of the whole truſt of the term abſolutely required that, the court muſt do ſo. It is ſaid, it muſt be ſo, becauſe it muſt refer to the time of the commencement in poſſeſſion; but there is no authority for that. That conſtruction has been made in caſes as to the time of raiſing the portions; as, I remember, it was in *Butler* v. *Duncomb:* but that was to comply, with what was taken to be the intent of the parties as to the time of raiſing the portions, that they ſhould not be raiſed out of the reverſionary term: and that ended by way of compromiſe, for the decree by Lord *Macclesfield* was a kind of an award, and what was not to be made by the ſtrict rules of the court: and the daughter was of age, and wanted it: but there is no caſe where that has been inſerted in the contingencies, which muſt be taken as put by the parties, and I cannot reject words of a contingency: I might as well reject the words of a limitation of an eſtate. If there are iſſue male born, who attain twenty-one, the contingency is at end that way; nor can the conſtruction for defendant be drawn from the other words, which are ſaid to point it out: nor can they add to or create a new contingency. The adding the age of eighteen was to prevent the raiſing before that time. The adding after the death of Sir *Robert* was to prevent what happened in *Corbet* v. *Maidwell*; of which determination the court has ever ſince repented, and always ſaid, they would never carry it farther; and that determination has occaſioned all conveyancers to inſert, that it ſhould be raiſed after death of the father, for fear of that conſtruction, and to avoid the conſequences of it: but that does not furniſh any conſtruction upon the contingency here put, or add to it. If any doubt ariſes as to that, the proviſo, which is part of the truſt of the term, makes it plain, and cannot be got over. I admit, ſuch a proviſo, for the ceaſing will not take away any contingency put in the truſt of the term: but when you come to the point of conſtruction, it will afford a conſtruction, and explain the ſenſe of words in the other part. If indeed the words "at the time of death "of Sir *Robert*" had been inſerted, the court would be compelled to conſtrue this in that manner: but they cannot be brought into the conſtruction, when it is ſo expreſſly againſt it, *viz.* at any time: ſo that taking all this declaration of truſt together, it is impoſſible to inſert new words, the parties have not inſerted, and to confine this contingency to the time of death of Sir *Robert.*

2 Ver. 760.
1 Wil. 448.

But this is on the ſtrict words. Now conſider, what might be the view of the parties. It is *petitio principii* to ſay, the plaintiff's conſtruction will make this truſt term nugatory and of no effect: if that is applied to the event which happened, it does ſo; but it is impoſſible to ſay that generally; for the truſt of this term will have the ſame effect, that the words import; *viz.* that if no iſſue male, or they ſhould all dye, whether in his life or not, the portion would be raiſable. This then is not to make it void abſolutely; it is only in this Inſtance. The daughters and all parties, who can claim under the truſt term, are certainly purchaſers: but that ſtill brings it to the queſtion, what they were intended to take, and how far? It is admitted, that if there was a ſon, who ſhould ſurvive Sir *Robert*, and attain twenty-one, whether before or after death of Sir *Robert*, it was not to be raiſed. But no material ſenſible intent can be drawn out of that. Suppoſe Sir *Robert* had a ſon by this wife, under age at time of his death, who lived a day after twenty-one, and died without iſſue male; was there not as much reaſon and good ſenſe, and according to the intent of the parties, to raiſe the portions for daughters as in the other caſe? This is different from the common rule of ſettling; but no certain rule or argument can be drawn from the method of marriage-ſettlements. Sometimes people are of that humour as not to put daughters and younger children out of the power of the eldeſt ſon: and that may be truſted in a prudent man: ſometimes they make no proviſion for daughters, unleſs iſſue male fails; as in *Hylton* v. *Biſcoe*. Here they took a middle way between both, neither making proviſion for daughters in caſe of iſſue male or on failure of iſſue male at any time, but in this manner; if no iſſue male at all, or the iſſue male ſhould die without iſſue before twenty-one, without regard whether that was in the life or after death of Sir *Robert*. The plain meaning was, that if he ſhould have a ſon, who ſhould attain twenty-one, and conſequently be in a capacity to make uſe of that eſtate with the father, or without him if dead, the eſtate ſhould be delivered from any contingency of this kind. The ſon might have lived to a greater age, and a great match might have offered: then Sir *Robert* meant to leave it in his power to make ſuch a ſettlement, as the ſon thought fit: and ſo they did, when he attained twenty-one. They could not bar this term, becauſe antecedent; but they did it without any regard to the truſt thereof. Theſe contingent portions were not to hang as a cloud over this eſtate all the life of Sir *Robert*; this was a middle way between the two methods of providing for daughters; and conſequently was leaving them in the power of the father, who appears to have no intent to make an ill uſe of this to the prejudice of his family. No contingency therefore has happened, on which theſe portions are to be raiſed.

Ante 17 June 1751.

Aylett

Caſe 111. Aylet *verſus* Eaſy, *July* 11, 1751.

No motion of courſe to enlarge time for publication on croſs bill after original proceeded in.

MOTION as of courſe to enlarge the time for publication.

Lord Chancellor deſired it to be taken notice of, that in all caſes of a croſs bill filed after the original cauſe was proceeded in, this ſhould be a ſpecial motion on notice, that the court might judge of it on the circumſtances, and not of courſe, as it is, where the original cauſe is not proceeded in; for otherwiſe it would be eaſy to delay the hearing of a cauſe by keeping this up; and in this caſe the original was actually ſet down.

Caſe 112. Gaſon *verſus* Wordſworth *July* 11, 1751.

Ante July 3.

THE former motion was again made, the commiſſion being brought over.

LORD CHANCELLOR.

Commiſſion to examine in *Sweden* being refuſed there and come back, the court will not ſend over another, nor read depoſitions taken openly according to the laws of *Sweden*. But had this commiſſion been executed there by a magiſtrate, it would be proper.

I thought, It might poſſibly come out, that the commiſſion might be executed in *Sweden* by the ſuperintendency of ſome magiſtrate there by that king's order. Had that been ſo, I ſhould ſtill in furtherance of juſtice have thought it properly executed, and not have ſcrupled the receiving a depoſition taken under ſuch a ſuperintendency: but it is impoſſible now, that it ſhould come out ſo, for the commiſſion is now brought over.

It was then deſired to put this off, that defendant might join in a proper application to the court of *Sweden* to have the examination taken; for that ſome method might be found by taking a new commiſſion to have it allowed by that crown, if it could not be had according to the common form.

LORD CHANCELLOR.

Where morally impoſſible to examine in chief, depoſitions *de bene eſſe* publiſhed.

I inquired, if there was any reaſonable expectation, that by poſſibility this might be read at the hearing as a depoſition in chief; for if there had been ſuch a commiſſion depending, I ſhould not have ſuffered this depoſition to be publiſhed, but waited till the other returned. But it appears, whatever is the event of the depoſitions now taking in *Sweden*, it is impoſſible to read them at the hearing; for the commiſſion is brought over here,

here, and they cannot be annexed to the commiſſion, that is ſaid to be by default of plaintiffs agent, which ought not to be an objection to defendant's proceeding: but no ſuch thing appears. He has done right; for the refuſal by that crown, and the calling it an unlawful commiſſion, (which can only mean, as it was a commiſſion out of this court to be executed in *Sweden*) is an abſolute diſclaimer, and imports a forbidding to act under this commiſſion; for the examination that king requires to be taken by magiſtrates according to the law of *Sweden*. How then can depoſitions, taken under this as in a judicature of that king's erecting, be allowed? So much as to the authority of it. Beſide as to the manner of it, it is a publick examination: whereas the rule of the court is, that the commiſſioners muſt keep ſecret, and not let what the other witneſs ſwore be known. It is impoſſible therefore to let that be read: nor will I ſend another commiſſion over under the ſeal of *Great Britain* to be treated in the manner, this has been. The ordinary courſe of the court is, that depoſitions *de bene eſſe* are not to be publiſhed, unleſs a witneſs dies, or is gone to a great diſtance; ſo that it is impoſſible to have a ſubſequent examination of him in chief. That is the uſual, but not the only caſe, in which the court can order theſe depoſitions to be publiſhed. The fundamental rule is, they are not to be publiſhed, but where there is a moral impoſſibility to have that examination in chief. That appears here; for what is now doing in *Sweden* is in direct diſclaimer of this commiſſion, and is by a pretended court ſet up there, and open, contrary to the ſubſtantial juſtice of this court, which requires it to be ſecret: and this examination *de bene eſſe* is as little to be found fault with as any ever taken; for defendant joined in it. I will make the common order, which is made on petition and affidavit of a Witneſs being dead; which is only, that when publication ſhall paſs in the cauſe, theſe depoſitions taken *de bene eſſe* be publiſhed.

Biſhop of Sodor and Man *verſus* Earl of Derby. Caſe 113.
Earl of Derby *verſus* Duke of Athol.
June 15, 1751.

BY letters patent 7 *J.* 1. a grant was made by the Crown of the Iſle of *Man*, and of all the rectories and tythes by name, to *William* Earl of *Derby* for life, to his wife for life, then to *James* Lord *Stanley* their eldeſt ſon in fee, to be held of the King by *liege homage*, rendering to the King immediately after that *homage* two falcons, and ſo to his ſucceſſors every reſpective coronation day two falcons.

Iſle of Man by private act of parliament made unalienable againſt heirs general on failure of iſſue male.

Stat. of wills and de donis extend not thereto.

By a private act of parliament paſſed at the ſame time, it was enacted, that Earl *William* and his wife during their lives and for the life of the longeſt liver of them, and after their death that their ſon *James* and the heirs male of his body lawfully begotten or to be begotten, and after his death without ſuch iſſue, that *Robert Stanley* and the heirs male of his body lawfully *&c.* and after his death without ſuch iſſue, that the heirs male of the body of Earl *William* lawfully *&c.* and for default of ſuch iſſue, that the right heirs of *James* Lord *Stanley*, ſhould have, hold, and enjoy freely and clearly againſt the King, his heirs and ſucceſſors for and upon the tenures therein mentioned, and againſt the widow and daughters of Earl *Ferdinand*, all the iſle, caſtle, pele, and lordſhip of *Man*, with the rights, members and appurtenances; and that neither *James* Lord *Stanley* nor any the heirs male of his body lawfully *&c.* nor *Robert Stanley* nor any the heirs male of his *&c.* nor any the heirs male of Earl *William*, ſhould have any power, authority, or liberty to give, grant, alien, bargain, ſell, convey, aſſure, or do away the ſaid iſle *&c.* and other premiſes in this act of parliament, or any part thereof, from his or their iſſue or iſſues or other perſons by this act appointed to enjoy the ſame; but that the ſaid iſle *&c.* ſhould continue as above limited; and that all gifts, conveyances *&c.* to the contrary ſhould be void and of no effect; ſaving and nevertheleſs that it ſhall be lawful for them to make ſuch leaſes and demiſes, as tenants in tail by the *St. H.* 8. may lawfully do within the realm of *England*.

Charles Earl of *Derby* in 1666 made a leaſe for 10,000 years of the rectories and tythes in *Man*, for the benefit of the poor clergy of *Man*, and made a deed as a collateral ſecurity for quiet enjoyment thereof, by which he conveyed certain lands in *Lancaſhire* to the Biſhop and others, in fee in truſt to permit Earl *Charles* and his heirs to hold the ſaid lands and receive the rents until interruption in the receipt of the rectory or tythes or any part thereof by the ſaid *Charles*, or any perſon claiming lawfully under him, or under his anceſtors or their aſſigns; that in caſe of ſuch interruption during the ſaid term the truſtees might enter into the ſaid lands and receive the rents.

James Earl of *Derby*, in 1735, deviſes and bequeaths to the plaintiff in the croſs cauſe and his heirs for ever, all and every his honours, caſtles, lands, tenements, and advowſons, real eſtate and hereditaments, whatſoever and whereſoever.

The ſaid Earl *James* was heir male of *James* Lord *Stanley* mentioned in the grant and act of parliament; and by his death

James Lord *Stanley* and all the other Earls being dead without iſſue male, the Duke of *Athol* enters and evicts the tythes.

Upon which eviction the truſtees brought the original bill in behalf of the poor clergy &c. in *Man* to have the benefit of the collateral ſecurity. The croſs bill was to have poſſeſſion of the iſle delivered; to have an account of the rents and profits; and that the Biſhop and clergy may hold the rectory and tythes purſuant to the grant to them.

For the Earl of Derby plaintiff in the croſs cauſe. Firſt, whether it was originally by law in the power of Earl *Charles* to make a grant of a particular part of this iſle at the time he did it? Whether he was reſtrained by act of parliament from making this grant? Whether this iſle was deviſable in its own nature? If ſo, whether it is deviſed? If the act of parliament had not interpoſed, no doubt but it was alienable at common law; and he had power to leaſe, as any tenant in fee might. It is implied in the words of the grant and on the act of parliament; for otherwiſe ſuch care would not be taken to prevent this alienation in other caſes. He was ſeiſed as tenant in tail, remainder in fee to himſelf. By the act of parliament an intail was created; to which eſtate in land the iſle was a ſtranger. It could be only granted by way of conditional fee; and then it would have another conſequence, from what it would in caſe of an eſtate tail. But this act of parliament has made this iſle intailable, and has actually intailed it, giving it all the properties of the ſtat. *de donis*, but has barred that fictitious method invented after that ſtatute in *Taltarum*'s caſe. It takes in all the male deſcendants then ſubſiſting, or that could ſubſiſt for the future in that family; the preſerving it in the name and blood of which family, where it had been from the time of K. *H.* 4. was the intent. The crown having parted with the whole fee, the remainder in *James* Lord *Stanley* is the ſame as a reverſion, and very ſimilar to a reverſion in fee in the ſtat. *de donis*, which may be aliened, though the eſtate tail cannot. That ſtatute created a new eſtate unknown to the law before, and of a very particular nature, being never grantable as all other eſtates were. None can grant an eſtate tail from himſelf to another, being inherent in him. The reſidue after creation of the particular eſtate was a reverter or reverſion in the grantor, and if given over to a third perſon, was called a remainder. Both theſe eſtates, reverſion and remainder, are diſtinct from an eſtate tail. Different perſons may be ſeiſed of them; nay the ſame perſon may be ſeiſed of both in different capacities, and diſpoſe of one though not of the other. Though doubted in the old books, as in *Rol. Ab.* whether a remainder or reverſion in fee is deviſable or not, that was upon the law before the ſtat. *de*

donis

donis, when it was only a poſſibility, and the wiſdom of the law would not ſuffer the alienation of a poſſibility: but the ſtat. *de donis* has altered it, ſo that it is eſteemed deviſable ſince. *Bro. Deviſe* 42. that a huſband might deviſe ſuch a remainder to his wife. Theſe were then two eſtates; and might have come to two different perſons, as they did in the courſe of the pedigree; and no difference from being in one perſon, he having the ſame right to diſpoſe of that reverſion or remainder as if in two. Whether this act of parliament has laid ſuch a reſtraint as not to leave the power of diſpoſing of the reverſion in fee, any more than of the eſtate tail (which is thereby abſolutely prohibited from being aliened) depends on the *proviſo*, whether that extended to the reverſion in fee, whenever it ſhould take effect in poſſeſſion; ſo that the intent of the legiſlature and of this family was, that there ſhould be a limitation unalienable from heir to heir for ever; which is quite a new kind of limitation. Whether it can be ſo done by act of parliament is doubtful; but certainly nothing elſe can. It is not expreſſed with any accuracy, that ſuch was the intent. Though the ſtat. *de donis* does not extend to *Man*, yet in making this act 7 *J.* 1. they ſeem to have had that ſtatute in view, and to convey the iſle with the title in the family according to that ſtatute, and muſt then have the ſame conſtruction. Whether or no there could be a fine or recovery of this iſle is uncertain: there have been ſeveral fines of the plantation lands.

LORD CHANCELLOR.

That is becauſe of the acts of aſſembly.

4 Inſt. 284. But this muſt be taken an eſtate tail in all events; ſuch as would intitle to dower, as held in *Kelway*, though the particular method of ſeeking that dower was there found fault with. Tenant in tail is only tenant for life with ſeveral powers. This act gives the power of leaſing, in the ſame manner as ſtat. *H.* 8. does to tenants in tail. This leaſe by Earl *Charles* is not abſolutely void, as it would be if there was no rent reſerved without any act by the iſſue in tail, much more by thoſe in remainder: but rent being reſerved, it is only voidable, like an infant's leaſe where rent is reſerved; for if no rent is reſerved ſuch leaſe is void. Being then only voidable, it is capable of being made good, *viz.* by acceptance of rent down to the death of the laſt Earl *James*. It is a clue to the act, that the clauſe therein was adapted to the caſe of tenants in tail by the ſtat. *de donis*; upon the inventors of which ſtatute great commendations have been paſſed; though afterward as great on thoſe, who found means to evade it. Conſidering the intereſt granted and tenure reſerved, no objection ariſes to this leaſe from the nature of the tenure. The grant by the letters patent was deſigned as beneficial as poſſible for the grantee, and as little ſo for the crown. The tenure, though

petty

petty ſerjeanty, has the nature and freedom of *ſocage*; and is therefore the leaſt burthenſome of tenures, putting Earl *William* in a better ſituation than if no tenure had been reſerved; for then the law would create a tenure by *Knights ſervice*. *Anthony Low*'s caſe 9 *Co.* 122. and in the caſe of *defective titles in Ireland* in the time of K. *C.* 1. which is extremely well reported by *Baron Barry*. Here are all the words to exclude the conſequence of *Knight's ſervice:* whereas this objection, taking it to be a feud of the crown, would put the grantee in the moſt unfavourable ſituation of any caſe ſince the abolition of tenures by 12 *C.* 2. ſince the conſequence of the King's tenant in *capite* aliening without licence is forfeiture, and taking it into hands of the crown. A feudal tenure is ſuch, as cannot be aliened without licence: but that rule has been departed from. *Bro. Alienation* 30. *b.* 10. the reaſon of the neceſſity for a licence of alienation was, that the crown ſhould not be deprived of the benefit of its military tenure, but ſhould know to whom the alienation was made, and have the fee for it: that holds not upon an alienation for years, for which a licence is never neceſſary, not being regarded from its weakneſs, altering not the feud, nor ſtanding in the way of tenant to the *præcipe* in a recovery, the law only regarding ſuch eſtates as depend on *livery*, *viz.* freehold, the tenant of which ſtill conſidered as a tertenant. But if there is a colour for neceſſity of a licence, the crown is precluded from having recourſe to a ſeizure upon the letters patent; and from the diſtance of time a favourable preſumption would be made, poſſeſſion having gone in this manner from 1666 to 1735. This leaſe then upon the intail ſpent is good againſt all claiming under the remainder in fee; under which, on the death of the laſt Earl *James* in 1735, the Duke of *Athol* claims; ſo that he had no power to enter or evict, and conſequently the collateral ſecurity is not liable, nor can the plaintiffs in the original cauſe come here for a remedy: for to intitle thereto they muſt ſhew, the Duke of *Athol* had a lawful title; for a tortious entry or eviction will not do.

As to the iſle itſelf whether, ſuppoſing it alienable, it is ſo by teſtamentary diſpoſition? It might bear an argument, whether by the general law of nations this might not be deviſed as well as other countries, if it did not depend on the nature of the feudal tenures, which were not deviſeable becauſe of the hurt to the Lord, who thereby loſt his relief, *&c.* but all that is now gone. *Selden* in his title *Honour*, *and Coke* 4 *Inſt.* 283 ſhew, this iſle has been aliened; and it would be very particular, if the different method of alienation ſhould cauſe a different conſtruction. The law of *England* muſt be the rule of conſtruction, it paſſing under the Great Seal of *England*, 2 *And.* 115. 1 *Inſt.* 9. 4 *Inſt.* 201, 284. Acts of parliament in *England* do not indeed extend to *Man* with-

out particular expreſs words; but that rule muſt be confined to diſputes relating to private property in the iſle by the inhabitants, which are to be governed by another law: the extent of that rule will not take in queſtions of the property and diſpoſition of the intire iſle itſelf, becauſe it is the ſubject matter of a grant by the crown under the Great Seal, and conſequently paſſes by an inſtrument framed in the language and manner of the laws of this country, and ſhould not therefore be conſtrued different from them. It is the ſame with the *Commotes* of the *Welſh* borders, in which even the King's writs run, as laid down by *Vau.* and is founded in reaſon. Then though it may be agreed, that this iſle is not part of the realm, but an acquiſition to the crown by conqueſt by K. *H.* 4. that does not prove it not deviſeable by the common law before the ſtat. of wills. Though a right and title was gained by conqueſt, that makes no alteration; the laws of *Man* ſtill continue the rule of their property. So it is as to *Jamaica* according to *Blanchard*; ſo notwithſtanding the conqueſt by K. *W.* 1. which introduced ſeveral *Norman* cuſtoms, yet the old cuſtoms remained. So of *Wales* and *Ireland*. But this iſle was both by forfeiture and conqueſt: though *Anderſon* and *Coke* differ from each other therein. The caſe 40 *Eliz.* 2 *And.* 115. 4 *Inſt.* 283. muſt indeed be allowed a great authority: but, if it did not relate to ſo great a queſtion, would be ſaid to be a moſt imperfect report, there being a ſtate of the caſe in neither. Though it is there ſaid, the ſtatutes of wills and uſes extend not to *Man*, it is not ſaid not to be deviſable before. As things ſtood originally at the time of that reſolution, it might be too hard to inſiſt on the ſtatute of wills extending thereto: but an act 7 *J.* 1. having interpoſed ſince that caſe, directing it to be held in common *ſocage*, which by a prior act being made deviſable, why ſhould not this be deviſable, in the ſame manner as it is made intailable, though never ſo before? and why ſhould it not be governed by the law of the land mixed, as it is, of the common and ſtatute law?

Next as to the extent of the deviſe, whether ſufficient to paſs this. It is not indeed particularly deſcribed: but there are ſeveral caſes, where *vi verborum* it muſt be ſo. The words are very ſtrong and comprehenſive; ſo that the ſtatute of wills itſelf has not more extenſive words, than this will has. This is determined to have all the properties of, and to be, real eſtate. *All my real eſtate* is, as *Holt* ſays, *genus generaliſſimum:* ſo is *all my hereditaments*, comprehending every thing in nature of an inheritance; ſo that an eſtate tail has been held forfeited by force of that word. It ſeems to be in view to paſs other than in *England* by the word *wherever*; no words accompanying to bind down the ſenſe here, as in *Wilkinſon* v. *Merryland*, *Eq. Ab.* and other caſes. It may be ſaid,

honours

honours are firſt mentioned, which is of an order inferior to that of an iſland, and ſhall not be extended higher: that rule holds not in caſe of wills, as it does in an act of parliament.

LORD CHANCELLOR

Allowed.

In a late caſe one ſeiſed of a ſmall, and intitled to the reverſion of a great, eſtate of Sir *Henry Johnſon*, deviſed his ſmall eſtate, (which he had moſt in contemplation) in a very particular manner, *all his eſtate, meſſuage, and tenement* called ſo, and all other real eſtates what and whereſoever: it was argued, that beginning with the ſmall, he could not mean afterward that of greater value and extent: *Your Lordſhip* held, ſeveral good manors paſſed under that, and they are now enjoyed under that. It is natural to think, the iſle was intended to go with the title. The teſtator might have the iſle in contemplation; and unleſs it appears clearly, he had not, as the words from their natural import are ſufficient to carry it, it will paſs. In both grants and wills it muſt be ſhewn on the other ſide, that it was not intended.

For Duke of Athol. Whether the demiſe of this term is good againſt the right heir of *James* Lord *Stanley* at the time of failure of iſſue male of *James*, of *Robert*, and of *William*, is the whole queſtion, and all the preſent queſtion of right that ariſes in conſequence of the original bill; becauſe if not good againſt him, the eviction is right, and the collateral ſecurity muſt take place; which will depend on the conſtruction of the private acts; and that ſo eſſentially as to be argued principally, if not ſolely, on that ground, though other arguments may be proper to be taken into conſideration. This act was adapted to a particular caſe, and was never extended to, nor can poſſibly, ſuit any other. It has been endeavoured to be overturned by begging a propoſition, and arguing from it as if true; *viz.* that the particular caſe, to which this act was applied, is the ſame with the general caſe exiſting in *England* before the *ſtat. de donis*, to which that ſtatute was applied, and therefore that there ſhould be by analogy the ſame conſtruction: but the contrary is true; the caſes being ſo far from being the ſame, that this particular caſe never did, (it might be almoſt ſaid) never could, exiſt before that ſtatute *de donis*. Firſt to ſtate how the law moſt notoriouſly ſtood and was eſtabliſhed as to the ſubject of this private act, the limitations of this feudatory kingdom or Lordſhip, immediately previous to the making the act; which is the way of conſidering how the act is to be applied to it. It happened, that the whole conſequences of law as to this ſubject were well known, there having ariſen a great

queſtion

queſtion about the latter end of Q. *Eliz.* and the perſons framing this act (who were great men) had that determination of their own in view. The diſputes in the family between Earl *William* and the daughters of his brother *Ferdinand* ended in a reference, or ſort of award in nature of a *pragmatick* ſanction, and an act of parliament paſſed in conſequence thereof; by which the whole *Derby* eſtate, that was in *England*, was ſettled: but as to this Lordſhip Earl *Ferdinand* appeared to have made a grant to uſes for good conſideration, the limitations in which would have been limitations in tail, if they had been of lands in *England*: and by his will (though it does not appear) he deviſed the whole iſle, as is plain from the *et cætera* in *Anderſon*; which deviſe muſt have been to the prejudice of his heirs, as it occaſioned diſputes between them and his brother. *Anderſon* and *Coke* agree in the reſolutions, but have not ſtated at large the whole of the caſe, only the conſequences in point of law; which muſt probably be from its being ſo notorious. The Judges determined, it could not be intailed, for that the ſtat. *de donis* extended not to it, nor the ſtat. of uſes, nor of wills; and therefore it could not be deviſed, as not deviſable in its own nature by the common law or within the ſtat. *H.* 8. Then it was ſtarted as a notion, that this was a male fief, which in the feudal law could not deſcend to the general or female heirs; for theſe fiefs originally never could go to collaterals. The reſolution of the Judges thereon, and very well founded, was, that in letters patent where the word heirs is made uſe of, it muſt be underſtood according to the ſenſe, the law of *England* puts on it. It is not granted according to the feudal law, but is an inveſtiture according to the law of *England*, being under the Great Seal of *England*, and then cannot be conſtrued according to the feudal or other law, and therefore deſcended to the heirs general like the *Commotes* in *Wales*; and between them and the heir male, agreements were entered into for the purchaſe of it. The crown had plainly no right to it. K. *J.* 1. made a grant of it to Earl *William*; which muſt be from a notion that this fief, though a ſovereignty, could not from the nature of it be aliened without the conſent or participation of the ſuperior; as it might then go into hands, the King would not like. To take away all doubts of that kind was probably the reaſon of taking in the King in making all the grants. There is indeed a diſtinction in all the old books between an Alienation and ſubinfeudation, and a ſubinfeudation and term for years; and it ſeems, that until theſe acts of parliament were made, the King's as well as other tenants might make a ſubinfeudation, but could not alien *in capite* without the King's conſent; which introduced the act of parliament, and ſhews, why the King interpoſed in theſe grants inſtead of theſe limitations being made by the family; but no ſtatute, particularly the ſtat. *de donis*, extended to this: all which was known

and certainly eſtabliſhed. This, being held of the King by a tenure ſimilar to the feudal laws, is not alienable without licence; as is clearly ſettled in *Craig* and *Wright's tenures* 29, 31, 154. This unalienable quality was the occaſion of what was conſiſtent with our common law, which did not permit the tenant to diſpoſe to hold of the ſuperior Lord: but the ſtat. *Quia emptores, &c.* does permit the tenant to diſpoſe of part to hold of the ſuperior Lord, as he himſelf held, not of the whole: but that ſtatute did not extend to tenants *in capite*, which were as at common law, as appears from the ſtat. *de prerog. Regis*. This reſtraint continued on tenants in *Knight ſervice*, that they could not alien the whole in any ſhape, nor any part ſo as to hold of the crown itſelf; that is, could not create tenants *in capite*. But 32 and 34 *H.* 8. are remarkable, giving power not only to make wills but to alien in the life of the parties, eſtates held in *ſocage* and in *capite* of the crown, but not eſtates held of the crown by *Knight ſervice*; and gives a particular power by deed or will to alien, which they could not do before without the King's licence, even lands *in capite*, ſo far as they did not extend to more than a third part, *&c.* Theſe ſtatutes ſhew clearly, there was a neceſſity to have acts of parliament made in order to give power to diſpoſe of even common eſtates by will, and a power to diſpoſe of eſtates in *capite*, ſo as to affect the crown in any ſhape whatever. But it is ſettled in 2 *And.* and *Cok.*, that neither theſe nor the general ſtatutes of this kingdom extend to *Man* any more than to the foreign plantations, as *Ireland, &c.* which they do not, unleſs made before the ſettling the place; for ſuch laws, as were made before, they muſt from neceſſity as *Engliſhmen* carry with them: and that is the conſtant practice at the *Council Board* on a queſtion concerning a ſtatute, whether it was made before or after, not binding them if after. Then the law being known, and all theſe points known, the iſle is bought by the heir male from the coheirs; and the crown conſents to the alienation. To conſider what effect the preſent limitations in the act would have had, if they had been made by the whole family concurring. The effect would be only the giving *James* a fee ſimple abſolute; for the whole family joining in a feoffment and refeoffment, or in any ſhape or contrivance, could not do otherwiſe. The inheritances before the ſtat. *de donis*, which clearly did not extend to it, were fees ſimple abſolute and conditional. He, who had a conditional fee, until breach, was owner of the whole inheritance: he held of the ſuperior Lord; his heir would have been in ward; and it was ſubject to all the conſequences of holding of the ſuperior Lord; could have aliened before iſſue born, 1 *Inſt.* 19. and *Wyllian* v. Lord *Barkeley*, *Plo.* as to his iſſue, becauſe he had a fee ſimple: but could not before iſſue had deſtroy the condition, becauſe the law conſtrues it as an eſtate to a man, if he

had iſſue, but did not conſider the condition as an intereſt, leaving the fee ſimple ſtill in him as owner. Then *James* would have been owner of the fee, and could have barred all his iſſue. Where would have been the reverter? It could not be granted to himſelf; for that would be a void grant: the condition could not be granted: it was no intereſt. Suppoſing it had been reſerved to Earl *William*, (for it could not be granted) and from him deſcended to *James*, it would not then have continued a condition; for if the condition had deſcended to the owner of the fee, the condition muſt have been extinguiſhed. It would then be an abſolute fee; for one cannot enter on himſelf for breach of a condition: like other conditions, of the payment of a ſum of money, if that condition comes to the man himſelf, it is abſolute: ſo that in no ſhape could it be in *James*. It could not be granted to him nor deſcend; for that would make the eſtate abſolute. It was conſidered only as a condition, and not the effect of a limitation, as *Wright* J. ſays in his tenures. The ſtat. *de donis* has reſtored it to a limitation, as it was. To conſider what effect the preſent limitations would have had, if they had been made good by the King's prerogative or by an act of parliament, which had only authoriſed the limitations, and gone no farther. The poſſibility of reverter could not be aliened to a ſtranger, it remaining in the grantor. In Lord *Stafford* v. *Buckley*, *Your Lordſhip* ſaid, that the King might grant a condition or poſſibility, as applied to ſuch a caſe before the ſtat. *de donis*. Suppoſing the King may do ſo, and had by his prerogative and letters patent made the preſent limitations, then would it be a grant of the poſſibility to the right heirs of *James* as a deſcription of the perſons who were to take the chance at the time, it was to take effect in poſſeſſion; it could not by implication veſt in *James* as an intereſt; becauſe it was no intereſt, and he had the fee ſimple without it by the firſt limitation. Nor could *James* alien this from his heir; for a poſſibility of reverter could not be granted away, until it came into poſſeſſion. Though donee might alien it after iſſue born, donor never could in any caſe: nor could this ever take effect in *James*, while he lived. Then it would be a grant to his heirs, which could not be taken from them, nor could take effect in poſſeſſion, until their anceſtor died. It muſt then be conſidered as a poſſibility of reverter in thoſe deſcribed to take it, and who could not take it before failure of iſſue male. It never could have veſted in *James*, who could not defeat it; nor is it within the reaſon of thoſe caſes of veſting an intereſt in the anceſtor; becauſe here all the conſequences of the feudal tenure are anſwered; for he is the owner of the fee: though indeed in this particular caſe there could be no wardſhip. The view of the parties was the continuing the Lordſhip in the family; which Lord *James* himſelf valued more than his own power. They wanted an intail, that was to continue: the ſtat. *de donis* not extending

Ante 23 Feb. 1751.

to

to it, would not operate on it, as was well known. If it had, there would be no occaſion for the act of parliament. The act was neceſſary for two purpoſes; to make the grants effectual from the coheirs and againſt the crown, and to eſtabliſh it; which was the main point; not intending to veſt a remainder in Earl *William* or reverſion in *James* by the limitation to the right heirs, but only to make a proviſion applicable to that particular caſe, to ſecure the ſucceſſion through different ſeries of heirs male, and then to ſecure it to the right heirs. The prohibition is added to thoſe, who might have barred, as *Robert* and *James*, and every heir male of their bodies, and the heirs male of the body of *William*; but not to *William* himſelf, becauſe the legiſlature did not think, he had more than an eſtate for life; and if they had not thought ſo, they could not commit ſuch a blunder. The ſame argument holds as to the limitation to the right heirs of *James*, who were to take a contingent hope of ſucceſſion. It was to no purpoſe to veſt it in the anceſtor, for he could not alien it ſeparately; could not have taken it from his heir, before it came into poſſeſſion. An act of parliament may limit a fee ſimple ſo as it cannot be aliened; but that muſt be by particular act of parliament, as in the caſe of Lord *Willoughby of Brook*: ſo of ſeveral honours limited to the heirs female: ſo is the barony of *Lucas*. This is a chalking out of different ſeries and lines of ſucceſſion: beſide the act has expreſly declared, the tenure ſhould be of the King; which could not be, if looked on as a reverſion, and not a poſſibility of reverter; for then it muſt be held of the reverſioner; and if that was granted away by *James*, it could not be held of the crown, but of the grantee. All this is laid down in Lord *Barkeley*'s caſe, *Plo.* Then the right heir is to take it as a chance of ſucceſſion. *Charles*, who made this demiſe, is iſſue male of the body of *William*, and is hereby prohibited, which would be overturned by the other conſtruction: whereas a ſettlement by act of parliament, which is a law made in that particular inſtance, is not to be conſtrued by the ſame rule as words in a conveyance of lands in *England*, or ſubject to the conſequences of it: but ſuch conſtruction is to be made, as will give it effect. *Wheatley* v. *Thomas* 1 *Lev.* 73. The poſſibility of reverter at common law before ſtat. *de donis* is not alienable, until it comes into poſſeſſion; as to which one part of the caſe of Sir *John Gordon* of *Park*, determined laſt ſeſſion in the Houſe of Lords, is very applicable. The queſtion was, whether a perſon forfeited an eſtate tail that he took, and alſo an eſtate tail to the heirs male of the body of his father? The Lords and Judges held, he did not forfeit the laſt limitation, becauſe it was not conſidered as a remainder veſted in him; for if veſted, he would have forfeited that, as he did the other; which ſhews, that though by our law that limitation to heirs of the body of the father veſted in the ſon over and above the limitation to himſelf and the heirs male of

Case of Sir John Gordon in Dom. Proc. in 1750 or 1751.

of his body, and therefore would be forfeited by our law, yet becauſe by the feudal law governing in *Scotland* it was not conſidered veſted in him, it was not forfeited. So in this caſe if there had been a forfeiture for high treaſon, it would be too much even by the *Engliſh* law to ſay, the heirs general forfeited, though there had been a forfeiture as to the other limitations, upon the authority of that caſe.

LORD CHANCELLOR.

That caſe is ſuch a mixture of *Scotch* and *Engliſh* law, that no inference can be drawn from it.

The ſuppoſed analogy between the ſtat. *de donis* and this act totally fails both in the foundation and ſuperſtructure. This particular caſe and the reaſon of it did not exiſt before the ſtat. *de donis*. The miſchief in that ſtatute was not, that it was hard, that one having a limitation to him and the heirs male of his body ſhould defeat his right heirs; had that been the particular caſe, to which the ſtatute was applied, the meaning of the ſtatute muſt have been to prevent this poſſibility of reverter from being barred: but as this caſe is not the ſame, neither is the remedy the ſame; for under this act of parliament there could be no fine, recovery, or diſcontinuance made of it; as it would be void and of no effect. If the legiſlature had thought the ſtat. *de donis futuris nonnam impoſuit*, this prohibitory clauſe was to no purpoſe: nor could the prohibition have effect unleſs applied to this caſe, to prevent *James*, *&c.* from hindering the right heirs enjoying this on failure of iſſue male. If then this alienation is not well warranted on the conſtruction of the act, it makes an end of the queſtion upon the bill by the clergy. It is ſaid, acceptance of rent will affirm this leaſe; but though that will make a voidable leaſe good, as by an infant or tenant in tail, yet never if abſolutely void, as a leaſe by tenant in tail to commence after his death. If this act was meant to reſtrain alienations in fee, it would be ridiculous, if it did not alſo reſtrain alienations for years.

Hitherto the caſe has been conſidered on the general power of alienation: now as to alienation by deviſe: which queſtion ariſes on the croſs bill, filed late in 1747, after this cauſe had been depending from 1742, and after the eviction had been known ſeveral years before. The intent is the great rule governing in wills. On this will, properly adapted to all ſort of eſtates in *England*, it could not be the intent under general words to give this iſle, a kingdom held of the crown of *England*, a feudal principality holding of a ſuperior. In its original it was for generations a kingdom, by degrees held of different princes, as of *Norway*,

Scotland, and for many centuries of this crown. *Hale's Hiſt.* 183. 2 *Camb. Brit.* 1443. *Calvin's Caſe*, 7 *Co.* 21. 4 *Inſt.* 283. and the hiſtory of it appears in *King*'s treatiſe. So that it is a kingdom, loſing its ſovereignty only to a certain degree, and what the *feudaliſts* called a *royal liege feud*. It is impoſſible then, that one ſhould by his will intend to give this, and not mention it. It is true the ſame words are uſed, as are in ſtat. *H.* 8. That ſtatute did not mean to include a feudatory kingdom; for they had been all given away from the crown. Had they then exiſted, the ſtatute would have either excepted them out of the power of deviſing, or qualified it; for theſe words never would be conſtrued to extend to things of this ſort. If K. *H.* 8. made a will, it could not be thought he intended to deviſe the crown of *England* by theſe general words; which if they were to carry it, would be contrary to his intent; which in no caſe can be done by general words. The word *dominion* is not in this will; if it was, being not generally uſed in common law inſtruments, there might be ſome colour for it. *Real eſtate and hereditaments* muſt relate to things of inferior nature. *Owen* 124. ſhews, honours, *&c.* will not paſs by general words. Beſide *honours* and *caſtles* are interlined, which is an evidence teſtator did not think, the general words of this will would carry them. The introductory words then ſhould be reſtrained within the bounds intended; which is common in wills, as in deviſe of all his lands and tenements, having two ſorts in the ſame place, freehold and leaſehold, the general words are reſtrained, not from the words in the will itſelf, but from the nature and circumſtances where other eſtates are ſufficient to anſwer it. Suppoſing this a reverſion (as it is argued) it muſt follow the eſtate in poſſeſſion; and this act of parliament makes no alteration as to the reverſion, leaving it as unalienable as before. It is ſaid to be made to prevent fictitious alienations by fine or recovery; but none could be levied in this iſle; for it muſt be levied of ſome county in *England*; in none of which is this iſle, as the iſle of *Wight* is. So as to the *Plantations*. Which have laws of their own. But it is determined 40 *Eliz.* that this iſle is not deviſable; that it deſcended to the heirs notwithſtanding the deviſe there, which was a deviſe of the iſle itſelf; and to that only is it applied, not to lands within the iſle, as has been argued. That reſolution holds as much now as before, becauſe founded on the general nature of the eſtate as not governable by the laws of *England*, but of another nature, and therefore not within the ſtat. of wills. If the crown of *England* conquers a country, and leaves the people to enjoy it, the conquered keep their own laws, until the conqueror declares the contrary; *a fortiori* where he declares they ſhall. An *Engliſh* colony carry with them all the laws of this crown in being at the time of planting it, which are adapted to the ſituation, not all others; but no ſtatute made after binds without naming them.

This iſle belonged to the crown before any act of parliament, *Pryn*'s *Inſ.* they are then to hold all their laws, and no ſtat. in *England* can extend to them. On the common law, which never tolerated wills, and which part of the feudal law was received in *England*, it could not be deviſed. *Craig.* 172. *folio*, where it is ſaid, as a common feud cannot be deviſed, it is ſtronger that ſuch as this cannot, *quanto gravius peccant*, *&c.*

LORD CHANCELLOR.

This caſe concerns a very noble and antient family, and alſo perhaps the moſt honourable inheritance, any ſubject of this kingdom can enjoy. In the argument a great deal of antient learning and points of feudal law of a curious nature have been drawn in: upon which if it was neceſſary to make a ſtrict determination, I ſhould take a conſiderable time for it: but as I do not think theſe particular points in the extent of them neceſſary to determine, though very properly brought into the argument, yet, my determination reſting on more plain and general points, I think it better not to delay the parties, or put them to the expence and trouble of a further attendance in order to conſider of it. Indeed a good deal of time would be neceſſary to ſpeak critically and correctly ſo as to ſatisfy oneſelf; becauſe, as they are points not occurring every day, books of general learning thereon muſt be looked into.

There are ſeveral queſtions ariſing on both bills: but they are all drawn in in conſequence of the original bill: becauſe if the Duke of *Athol* had no right to evict, or has not a title to the whole iſle, but Lord *Derby* has, either one or the other makes an end of the relief ſought by the original bill. To take the queſtions in their natural, order the firſt (becauſe it goes to the whole) is, whether Lord *Derby* has a title to the whole iſle, lordſhip and dominion of *Man*? Next, if he has, whether that is ſuch an inheritance or a title of ſuch a nature, that he has right on his croſs bill to come into this court to pray not only againſt the collateral ſecurity, but alſo as to the whole iſle to have his title eſtabliſhed, and a decree for it.

Iſle of Man part of the crown, not realm, of England; being grantable under great ſeal. Laws of England extend not thereto, unleſs named: it is not alienable without licence, unleſs for chattel intereſt.

As to the firſt it appears, from what is laid before me, eſpecially under this grant and act of parliament 7 *J.* 1. that Lord *Derby* as deviſee (for ſo only can he claim) has not a title to the iſle and dominion of *Man*. As to the points taking in very large and diffuſive learning I ſhall not determine, but touch upon, them. Many things are admitted on both ſides; that *Man* is not part of the realm of *England*; parcel only of the King's crown of *England*; a diſtinct dominion now under the King's grants, and ſo ever ſince from a long time paſt granted; held as a feudatory dominion by *Liege Homage* of the Kings of *England*: the laws of *England* therefore as ſuch extend not to it, neither the common or ſtatute-law,

law, unleſs expreſſly named, or ſome neceſſary conſequence reſulting from it. But notwithſtanding that it was an eſtate and dominion in the King of *England*, not parcel of his realm, but of his crown, which he could grant under his great ſeal, and, as ſaid in *Anderſon*, could be granted by him in no other manner; becauſe the great ſeal of *England* operates in all the dominions, not only parcel of the realm but of the crown: the King therefore can grant lands in *Ireland* and the *Plantations*, *Jerſey* and *Guernſey*, under the great ſeal of *England*, becauſe part of his crown. It was part of the reſolution 40 *Eliz.* 4 *Inſt.* 283, that the grant of K. *H.* 4. to this family was a good grant under the great ſeal. This grant created in its effect a *ſocage* tenure. The former grant to Lord *Northumberland* to carry the *Lancaſter* ſword, being to be done by the body, was clearly *grand ſerjeanty*, which is *knight ſervice:* but this is by *homage*, which, where no other is reſerved, is according to *Coke* preſumed to be *knight ſervice:* but not where others are reſerved, as here: and that appears to be contrary to what, they intended, and was what, they guarded againſt: it is therefore in *ſocage*, whether *petty ſerjeanty* or not perhaps is not ſo clear, becauſe *Coke* confines that to the delivering things of a warlike nature, which this does not import: though, as it was to be rendered to the King at his coronation, I ſhould ſtill incline to think, it was *petty ſerjeanty:* but there is no occaſion to enter into that: it is ſtill *ſocage*, and the reſervation of *liege homage* would not alter it. *Anderſon* properly explains, that the diſputes aroſe by the deviſe of this iſle by Earl *Ferdinand*; on which it appears by the recitals of this act of parliament (and which I muſt take to be true though the facts are not explained) that an agreement had been entered into, and a price paid by *William*, brother and heir male of *Ferdinand*, to the daughters and heirs general; for ſo it is expreſſly recited in this act; on which they without any ſurrender to the King take a new grant from the crown, on what foot does not appear; whether from any apprehenſion of a forfeiture which they had a mind to purge, or to prevent taking a licence; for without that, I think, they could not have done it. Still they were not content with this new grant; and they plainly ſaw, that if they let it reſt on that, *James* Lord *Stanley* would in ſome ſhape or other (I enter not into the queſtion whether with licence or not) have power to convey this iſle, and conſequently to defeat the heirs general and any ſubſequent ſons and heirs male of himſelf or of his father; by conſent of the crown therefore and agreement of all parties they come to a private act of parliament; by which out of this fee in *James* they cut and provide new limitations; on which the firſt queſtion is, had *James* or any perſon, who could claim as right heir to him, a power on the foot of theſe limitations to grant and convey this eſtate, at leaſt before ſuch time as the remainder in fee ſhould come into poſſeſſion? Speaking of this abſtracted from that nice queſtion of the difference be-

Homage not knight ſervice, where other is reſerved.

tween a ſtrict reverſion and a poſſibility of reverter on the law as it ſtood before the *St. de Donis*, and abſtracted from the prohibitory clauſe of alienation, neither *James* nor any heir general of him could have power to alien by any method of conveyance whatever this iſle and dominion without licence of the crown, and that by direct conſequence of the tenure created by the letters patent; and it is enacted, that all thoſe perſons ſhould hold by that tenure; for though it is in *ſocage*, it is in *capite* of the King, and is of the moſt honourable kind not only in the *feudal* law but common law of *England*. Before the acts of parliament varying that law (which acts of parliament no more than the *St. de Donis* can extend to this) whoever held in *capite* of the crown, could not alien without the King's licence. 2 *Inſt.* 65. *Coke* ſays, where lands are held of the King as King, *&c.* and aliened without licence, that the better opinion was, that only a fine ſhould incur, and the King might ſeiſe, *&c.* yet it plainly was taken to be otherwiſe, and that at the time of making the *St. de Prerog. Regis*, that on alienation without licence they were forfeit to the crown, and the law is ſo ſtill as to all ſorts of tenures, that are not within thoſe enabling ſtatutes made: and therefore there are *feudal* honours in *England*, at leaſt one, which is the caſe of the caſtle of *Arundel* in the Duke of *Norfolk*'s family, that cannot be aliened without licence of the King. *Hale* ſays the ſame of the Barony of *Berkeley Caſtle*, holding it to be a *feudal* barony: though, I believe, the general opinion is to the contrary: but he lays down the law generally of both, that they are not alienable without licence. If ſo as to them, certainly ſo as to this iſle, which was no part of the realm of *England*, and to which theſe acts of parliament could not poſſibly extend unleſs named. The uſe, I make of this in 2 *Inſt.* and other caſes, is not to ſhew any alteration made in the law of *England*, or that theſe acts of parliament extend to this iſle, but to ſhew what was the general law derived from the feudal law before. So is *Wright's Tenures*, that ſuch a licence of alienation was neceſſary. If ſo then on the foot of the limitations themſelves, that might make it unneceſſary in reſpect to the title to the whole iſle to go into the other queſtions; becauſe here is no pretence of any licence; and though the *St. of Wills* meant to enable alienations without licence, it is determined, that ſtatute does not extend to this. It is admitted, the *St. de Donis* does not, and then the *St. of Wills* cannot. But the act of parliament goes farther, and brings in another point, which not only extends to that of the want of a licence, and to the title of the whole iſle, but alſo to the grant or demiſe of 10,000 years; for the want of licence to alien does not affect this grant; for though it ſeems odd to ſay, the King's tenant *in capite* could not alien for life, in fee, or in tail without licence, but could for 10,000 years, yet it is founded in the reaſon of the thing, the one altering the tenure, the other not, the tenure and wardſhip being the ſame, although it might diminiſh the value of

Alienation without licence.

2. where? In his notes on Co. Litt. 15. b.

of the wardſhip, if it was *knight ſervice*: but if it was inquired into, at the time of making this grant of K. *H.* 4. theſe long leaſes were not in being: however I give no opinion upon that. Conſidering it as a chattel intereſt he wanted not a licence to make this leaſe: but that brings in the prohibitory clauſe, and is a material part of the caſe, and goes to both, extending not only to the iſle and dominion but alſo to all the particular eſtates mentioned therein, part of which is this rectory and tithes, which are part of this leaſe. This clauſe of prohibition is ſomething extremely near to the prohibitive, irritant, and reſolutive clauſes in the *Scotch* law, the irritating clauſe making it void, and the reſolutive extinguiſhing the right; ſo that they did not reſt on the prohibition, but made it abſolutely void; for it might be ſaid, you may contend it: though it might be too hard perhaps to ſay that upon an act of parliament. Then it is ſaid to be conformable to the *Stat. de Donis*; for that this iſle not being within that ſtatute they meant to make a private act of parliament analogous thereto, and to grant ſuch eſtates as that ſtatute would warrant, and to reſtrain alienations in the ſame manner, and that therefore no reſtraint is upon any of the heirs general of *James* Lord *Stanley*: but I think myſelf not warranted to ſay in this caſe, that all, the parties meant, was to create ſuch eſtates and ſuch reſtraint of alienation merely, as the *Stat. de Donis* creates. They do not refer, nor is there any eye, to that ſtatute; and the intent appears to continue in the name and blood of *James*. It is ſaid, that to make eſtates tail unalienable will anſwer that purpoſe: ſo it does as to the continuing in his name, but not as to his blood. Conſidering them on the foot of the *Stat. de Donis*, and that theſe were eſtates tail, there was no want of a reſtrictive clauſe at all; for before *Taltarum*'s caſe which has eſtabliſhed the doctrine of recoveries, and the *Stat. H.* 7. of fines, theſe eſtates before the *Stat. de Donis* were unalienable: but of *Man* no fine or recovery could be levied: conſequently if this ſtatute is analogous to the *Stat. de Donis*, it would be ſufficient to ſay, theſe eſtates ſhould be held by the perſons named: there would be an end of it except as to the limitation to the right heirs of *James*, which would be out of the force of that ſtatute: for certainly ſince the *Stat. de Donis*, which has ſplit the fee into ſeveral eſtates, and made the poſſibility of reverter a reverſion and an eſtate, the owner thereof might, though he was not in the power of tenant in tail until common recoveries were invented, alien that reverſion himſelf, as he pleaſed: therefore there is no manner of occaſion on that foot for this prohibitory clauſe. But ſtill it is contended, I ought to conſtrue the clauſe confirming the limitations, and alſo this prohibitory clauſe, according to the rule of the *Stat. de Donis*; for that private acts of parliament are to be conſtrued by the general law of the land, and as private acts of parliament, and therefore in the ſame manner as that ſtatute. There is no warrant for me to do that by any recital or words. But the

penning of this act of parliament is different, and goes farther than the *St. de Donis*, which has no words reſtraining alienations by reverſion or remainder, but by tenant in tail: whereas this act of parliament has expreſs words of reſtraint even on *James*, the owner of the reverſion in fee. On comparing the words of the *Stat. de Donis* there is no reſtraint of alienation but on perſons, *quibus tenementum ſic fuit datum ſub conditione*, *viz.* thoſe who would have the fee ſimple conditional at common law; not on the reverſioner himſelf, or thoſe who might take under him: but the words of this act of parliament go vaſtly beyond that reſtriction: therefore to ſay, I muſt conſtrue this analogous to that, is to ſay, I muſt conſtrue one act of parliament penned in one ſet of words according to the conſtruction of another penned in another ſet of words. Still it is ſaid, there is no reſtriction laid on the heirs of *James*: but by the expreſs words of the ſubſequent clauſe, all acts whatever, done by any perſons to prevent the eſtate from being held by any of the perſons or heirs mentioned there, ſhould be void; which conſequently excludes any ſuppoſition, that a different kind of right and power of alienation was meant to deſcend to the heirs of *James*, which was not meant to *James*. Nor is there any reſtraint on *William*; ſo that by this doctrine, if this is to be conſtrued according to the general rule of the *Stat. de Donis* and of lands in *England*, that eſtate would unite with *William*'s eſtate for life, and conſequently, if he could poſſibly have ſuffered a recovery or levied a fine, he might have barred theſe limitations, and have barred his own iſſue male: or if taken the other way, as ſo many particular limitations of the nature of fees ſimple conditional at common law, ſtill he would have power to do that. So that on this clauſe this is clearly the true conſtruction, force, and effect of it. When therefore it is ſaid, on comparing this act of parliament to the *Stat. de Donis* that any of the heirs of *James*, and conſequently the laſt Earl of *Derby*, might do this, becauſe he had the eſtate tail and fee in him, I allow the rule, *quando duo jura concurrunt*, it is the ſame as if *in diverſis*: but the rule holds the contrary way, that *James Lord Stanley* is equally reſtrained in one capacity as in the other. To put the caſe fairly it muſt be put ſo, as if the reverſion in fee had been hereby limited to a ſtranger. The conſtruction would be the ſame in both caſes, and both are reſtrained from aliening; for no one will ſay, that though it would be ſo in caſe of a ſtranger, yet his heir at law ſhould have power to alien: that would be abſurd. The parties could not by any poſſibility have made a ſettlement by the family of this eſtate ſo as to prevent alienation, provided there was a licence from the crown; for, as it is admitted to be out of the *Stat. de Donis*, the conſequence would be, that any eſtate, they could have created, would be but a fee ſimple conditional; and they could not have carried it further, but muſt have ſtopped at *James* and the heirs of his body; for if they had attempted a remainder, it would be undoubtedly

2 Inſt. 335.
5 E. 2.
4 E. 3.

doubtedly a releaſe and diſcharge of the condition; for which I rely on the caſe in *Carthew*, that a fee ſimple conditional cannot ſtand together with an abſolute fee, but will be merged in it; the reaſon of which holds juſt to this; and there was no caſe before the *Stat. de Donis*, where an eſtate was granted as a conditional fee to one and the heirs of his body, and the ſame eſtate limited to his heirs or remainder to another; it could not be done, at leaſt by a common perſon: I will not enter into the queſtion, whether it could be granted by the crown by prerogative. As this then was not in their power to do by common conveyance, they choſe to do it by act of parliament. It is very material, and was great part of what led to this, that theſe heirs female, who for a conſideration parted with a preſent right, and perhaps that conſideration not equal in value, yet did not mean to depart with the poſſibility of inheriting it; it was material therefore to them to model it ſo, that none of the perſons under theſe limitations ſhould have power to defeat and prevent its coming to the heirs general, who on failure of iſſue male would be heirs female of the family; which was the only way of a *ſpes* of ſucceſſion to them. It is alſo material, that no other perſons are appointed by that act of parliament except thoſe named and their iſſue and the heirs general of *James*; none others that can come within theſe words but the heirs general of *James*; then to ſay this prohibition extends not to them, is to ſay, theſe words are to be rejected out of the act. Next as to the clauſe concerning the power of leaſing I do not think, there is any inference from thence. It is ſaid to have a reference to, and to give the like power as tenant in tail had, by the *Stat. H.* 8. If it was ſo, I know not, what would be the conſequence: but I do not think, it is ſo: for the *Stat. H.* 8. is only referred to for the ſake of deſcribing the leaſes: and I believe, ſuch power has been given in private acts of parliament, and acts of parliament where the perſon, to whom that power was limited, has not had an eſtate tail. Beſide it is ſtill apprehended, that this was not ſuch an eſtate tail, as any ſuch power could ariſe on by that ſtatute; for theſe lands lay not within the realm of *England*. This act of parliament therefore has made this iſle and the particulars therein unalienable againſt the heirs general. But whatever becomes of that queſtion as to the property of the iſle, the ſtate, lordſhip, and dominion, if there was not this reſtraint, this deviſe could not poſſibly be good; for it is expreſſly determined by that caſe, by which I ſhall think myſelf bound, that the *Stat. of Wills* does not extend to this. It is admitted, the *Stat. de Donis* does not; and then there can be no reaſon, why the other ſhould. Then there can be no ground to think, that by the *Stat. of Wills* this feud was deviſeable, when it is out of the *Stat. of Wills*. By the common law it certainly was not deviſeable, unleſs a cuſtom for it. Taking it on the feudal law, nothing is more contrary thereto than to ſay, there ſhould be a deviſe. That is more ſtrong againſt allowing teſtamentary

teſtamentary diſpoſitions than againſt any other by reaſon of the ſurpriſe on the party, and the bringing an improper tenant on the Lord. But, taking it out of that, he could not convey by deviſe without a licence, no more than by any other manner. I will not then enter into the queſtion, whether the words were large enough to take it in: but the conſequence is, that both the deviſe of the lordſhip and dominion of *Man*, ſuppoſing it large enough, would be void as againſt the Duke of *Athol* heir general of the family, and this leaſe is alſo void becauſe of the nature of this ſettlement and the reſtrictive, prohibitory clauſe in this act of parliament; nor is there any ground to make another conſtruction. It is admitted, an act of parliament may make even an eſtate in fee unalienable; † and there are ſome, though not many, acts of parliament of that kind in particular families. The only queſtion therefore is upon the conſtruction and operation of the act; and it is manifeſt, that even the family itſelf doubted, that this leaſe was void; otherwiſe Earl *Charles* would not have given the collateral ſecurity: and afterward when *James* Earl of *Derby* came to the eſtate, he had the ſame doubt; not that he laid hold of that doubt to evade that leaſe directly, but he would have choſen to turn it on the collateral ſecurity. There are great ſymptoms therefore of its being ſo underſtood in the family. The deviſe then is totally void by force of the private act of parliament, and the reſtrictive clauſe therein. The grant of the tythes and rectories is alſo void: and that puts the nice diſquiſitions of points on the feudal law out of the caſe.

† ſee Knight's case 5. Co. 56. a. where it is said, that the king may make a fee unalienable by condition. &c. also Dy. 2. a.

Ante Feb. 8, 1748-9.

On the next queſtion I do not mean to give a ſtrict opinion to bind myſelf, but mention it becauſe of the plea put in to the juriſdiction of this court by the Duke of *Athol*, and that I may not appear to contradict myſelf. There have been great doubts as to that; for the Earl of *Derby* comes upon a legal title, ſpeaking of the whole iſle, and therefore that might be a great objection to the juriſdiction of this court as a court of equity. I go farther; there might have been great doubt, whether, ſuppoſing that point of equity out of the caſe, he could come in reſpect of the original juriſdiction of this court and nature of the inheritance, becauſe it is out of the dominion of *England*; and, unleſs it could be brought within the rule of *Commotes* in *Wales* or *Lordſhips Marchers*, it would be a ſtrong objection againſt coming to the King's courts; for theſe *Marchers* were originally parcel of the realm of *England*, and therefore in a queſtion between two *Lordſhips Marchers* it muſt be determined in the King's courts, becauſe it could not be determined there. I could have retained the bill, and ſent the parties to try the title at common law, and determine it by the proper juriſdiction, which was ſaid to be the King in *Council*: but conſidering my opinion that is not neceſſary.

As to this point of juriſdiction Ld Hardwicke's judgment in Penn Ld Baltimore v. 1. Ves. 446.

I would

I would not be underſtood, when I over-ruled the plea of the Duke of *Athol*, to have over-ruled it on affirmance of the general juriſdiction of this court to try and determine the title to the iſle of *Man* or any ſuch feudatory dominion, but merely on this; the plea was to the juriſdiction without averring to what court the juriſdiction belonged; and the rule of law is, that in a plea to juriſdiction like a plea in abatement, where it is to a court of general juriſdiction, you muſt alſo ſhew where the juriſdiction veſts, as well as negatively that it is not there: but if it is an inferior court, you need only plead thereto, and not ſhew where it is. This is a court of general juriſdiction; and that was not then ſhewn. Then it came in queſtion, whether I muſt over-rule it *in toto* or in part. I was of opinion, *in toto*; for the rule of the court is upon demurrer to the whole bill, where the demurrer covers more than it ought, the court will not ſplit and divide it, as it will a plea; for a demurrer is taken unfavourably, and therefore it will be over-ruled: but that does not deprive the party of his equity; for the ſame thing may be inſiſted on in his anſwer. Then ſuch a Plea to the entire juriſdiction ought ſurely not to be received more favourably than a demurrer; and therefore I over-ruled that alſo. The inclination of my judgment, until that objection of the informality was ſtarted, which appeared in the latter part of the plea, was to have allowed the plea as to ſeeking poſſeſſion of the iſle, as to the royalty of *Man*, but as to the reſt of the relief as to the collateral ſecurity to over-rule it: but that being inſiſted on, turned my opinion to over-rule the whole plea.

Plea to juriſdiction of a general court muſt ſhew where it is: not ſo of inferior court.

Plea to juriſdiction over-ruled in toto, as a demurrer covering too much.

The queſtion then comes on the collateral ſecurity, and what relief the plaintiff in both cauſes is intitled to as to that; for the opinion given as to the validity of the will goes not only to the deviſe of the whole iſle, but to the grant for 10,000 years; and conſequently the plaintiffs in the original cauſe are intitled to relief as to their indemnity; for which they had a right to come into this court, ſuppoſing it had been a mere bounty in Lord *Derby*, againſt any one claiming voluntarily under him; or whether it was for a debt, he might ſubject it thereto. It is the common caſe of an indemnity; which muſt be by an account taken of the rents and profits from the time of the eviction, which Lord *Derby* muſt pay to them according to the truſt of the term; and let his bill, ſo far as it ſeeks to eſtabliſh his title to and poſſeſſion of the iſle, *&c.* of *Man*, be diſmiſſed.

He muſt pay coſts to plaintiffs in the original cauſe; but no coſts as between him and the Duke of *Athol* upon ſuch a queſtion ſo intricate in itſelf.

Caſe 114. Howel *verſus* Howel, *July* 18, 1751.

Marriage articles not decreed in ſtrict ſettlement, where by a difference in the penning the parties intended to leave part in father's power.

BY marriage-articles in 1691, part of an eſtate was limited to huſband for life, remainder to wife for life, and after death of ſurvivor remainder to heirs of the body of the wife by the huſband: another part to the huſband for life, remainder to heirs of his body, remainder to the wife.

The bill was by the eldeſt ſon after death of father and mother to have the benefit of the articles, by having them carried into execution ſtrictly to the firſt, *&c.* ſon, according to the general principle in *Trevor* v. *Trevor*, *Eq. Abr.* and *Weſt* v. *Eriſey*, 2 *Wil.* where even a ſettlement was corrected by the articles, *Honor* v. *Honor*, and other caſes; and to be relieved againſt a deed, which the plaintiff ſaid, he was drawn in to execute on a repreſentation, that his father had a right to the whole eſtate, to do what he would with it.

The defendants, the younger children, who claimed a benefit under the ſaid deed executed on the father's ſuffering a recovery, inſiſted, this was not the common caſe, but very particular, being in the firſt part to the heirs of the body of the wife. This cannot be by miſtake, which will not be preſumed, where there was a natural view for it, *viz.* to prevent either of the parties from defeating, but not from doing it by joining therein to make a proviſion for their family according to the circumſtances. Where it is not the meaning of the parties to make a ſtrict ſettlement, a court of equity is not bound to do ſo. In *Whately* v. *Kemp*, 17 *Feb.* 1734, on bill by mortgagee to redeem or foreclоſe, defendant inſiſted, that by articles previous to marriage of his father and mother they agreed to purchaſe lands of ſuch a value, and ſettle to uſe of huſband for life, of wife for life, remainder to uſe of heirs of her body by him, remainder to uſe of heirs of ſurvivor: they purchaſed, * and joined in recovery to uſe of plaintiff in fee by way of mortgage: defendant inſiſted, that his mother being dead, he was intitled on conſtruction of theſe articles in equity to have this eſtate ſettled to the firſt, *&c.* ſon, in tail male. Sir *Joſeph Jekyl* held, that if this was a common limitation, he ſhould have thought, what the defendant inſiſted on, right; and that the mortgagee muſt have loſt his eſtate: but that this was particular, to the heirs of the body of the wife by him, and being *ex proviſione viri* would ſecure the children againſt the father alone, and that it might be the real intent, that both might bar, comparing it to a power of revocation both by father and mother, and that

* It was ſaid, that was copyhold, to which ſtat. 11 *H.* 7. does not extend.

defendant

defendant was therefore well barred. *Powel* v. *Price* 2 *Will.* 535. ſhews, the court goes on the meaning of the parties having a different view. The preſent bill is to unravel all that was done by the father and plaintiff himſelf with his eyes open, confirmed by him after his father's death, and to ſtrip the other branches of the family.

LORD CHANCELLOR.

There is a difference in the penning of theſe two limitations. On the firſt they might have in view to leave it in the power, not of the father only but of both, to vary. But on the ſecond there can be no ſenſe of that limitation, but as the plaintiff contends; otherwiſe it would be abſolutely in power of the father by fine to bar it, and defeat all the iſſue. They intended, the wife ſhould have a jointure in one, in the other not. It ſeems a ſtrong diſtinction on the face of theſe articles; and there have been caſes adjudged on that. Where by articles part of an eſtate is limited to father for life, to wife for life, to firſt and every other ſon and daughters in tail; another part to father for life, and heirs male of his body by that wife; Lord *Macclesfield* ſaid, if that had been the ſole limitation, he ſhould without ſcruple decree in ſtrict ſettlement according to the common rule: but where the parties had ſhewn, they knew the diſtinction when to put it out of the power of the father, and when to leave it in his power, he would not vary the laſt limitation, decreeing to the father in tail as to the laſt, though not as to the firſt. Beſide the plaintiff here long after his father's death, when he knew how things ſtood, confirmed part of that agreement, though not the whole, and paid intereſt ſeveral years afterward of the proviſion for defendants. There was a caſe before Lord *Cowper*, in which the father uſed paternal authority and ſome harſhneſs to induce his ſon after coming of age to make a new ſettlement of the eſtate, by which he brought voluntary charges on it for benefit of the younger children, of which there were ſeveral; and notwithſtanding there were circumſtances in it not to be approved of, yet as the ſettlement itſelf was reaſonable, it was allowed. And as in this caſe there is a difference in the penning of the articles, in one of which they might intend to leave it in the power of the father, in the other not in his power to do alone; it ſeems a reaſonable way.

The reſidue of the proviſion under the deed was decreed to be conſidered as a charge on the eſtate.

Knight

Caſe 115. Knight *verſus* Dupleſſis, *July* 29, 1751.

Receiver not appointed for heir at law to turn deviſee out of poſſeſſion.

THE late Lord *Colerain* deviſed, that from his death until his daughter *Roſa Peregrina* attained twenty-one, or married with conſent of her mother, the mother ſhould receive all the rents and profits from all his lands in *M.* and *N.* with directions to pay 300 *l. per ann.* to the daughter, and to take 900*l. per ann.* to herſelf, and to account with the daughter if ſhe attained twenty-one or married; if the daughter died before either, then it was deviſed over to the plaintiffs, who as nieces and heirs at law of teſtator brought a bill, and now moved for a receiver, and to ſtay waſte generally and to inſpect deeds and writings.

For plaintiffs. There is no preſent intereſt deviſed by the will ſet up; only a bare power to receive the rents for benefit of the child on contingency; and there is danger of their being entirely loſt, as no ſecurity was given that the mother is in good circumſtances, and the rents ſafe in her hands, who has committed waſte. If this was the teſtator's child, it muſt be a baſtard: who Mrs. *Dupleſſis* is, does not appear. The plaintiffs have charged her to be an alien; to which no anſwer is put in, and a ſtrong preſumption that it is ſo. It cannot be told exactly, where this child was born; probably beyond ſea, as the teſtator has almoſt declared by her name. There appears a raſure in the regiſter of *Colcheſter* to adapt it to this deviſe to the child.

LORD CHANCELLOR.

Conſidering the credit the law gives to theſe regiſters, and the materiality of their evidence, it is very neceſſary ſomething ſhould be done, ſome care taken by parliament as to the cuſtody of them, this not being the firſt inſtance of this kind. There was another relating to Sir *Thomas Coleby*'s eſtate. Theſe regiſters ſhould not be ſuffered to be altered after the firſt entry. It is criminal in itſelf: but ſhould be made highly ſo.

For plaintiffs. It does not ſeem yet determined by any caſe, who ſhall have an eſtate deviſed to an alien. The extent of an alien's right may be judged from his remedy: he cannot take a real eſtate, nor term for years, unleſs perhaps as executor or for benefit of commerce, nor do ſeveral other acts. Then ſhe has no legal eſtate, and ſo feeble a title that ſhe cannot recover theſe rents; if the tenants will not pay, ſhe can bring no ejectment; and it is reaſo-

nable they ſhould be paid to ſomebody; and the legal title muſt be in the heirs at law.

Attorney General for the crown did not oppoſe a receiver. The only difficulty was, how far it might interfere with an information in the *Exchequer* to ſupport the right of the crown brought for evidence, and a motion made for injunction to ſtay waſte, as to iſſuing of which that court had taken time to conſider until next term. Ante Trin. 1751.

For defendants. This was fully entered into on the former motion, *Mich.* 1749, when *Your Lordſhip* held, there was no ground to grant it; ſaying it was very far from being a ground, that becauſe a will was litigated, an heir at law can come into this court to affect the intereſt of the deviſee, or be aſſiſted here barely becauſe that queſtion was depending; that it amounted to what was equal to a contingent intereſt; and that though a queſtion might be, to whom it ſhould belong, if the child died under twenty-one, that was no ground to turn the mother out of poſſeſſion for a receiver: nor would the court throw an imputation on the merits of a queſtion; for the plaintiffs were then and are now litigating it in the eccleſiaſtical court. The only additional circumſtance now is a doubt that has ariſen, whether the defendants were not born abroad. This motion is not on behalf of the crown, which purſues in another court on the point of right, ſhould they come out to be aliens: but if ſo, that does not ſupport or give a title to plaintiffs, who ſuggeſt nothing but a poſſibility of title in a third perſon. An alien can take by purchaſe, and by any inſtrument that makes one purchaſer, but muſt hold for the crown. Plaintiffs come on a mere legal title, and no equity, no term ſtanding in the way. Heir at law cannot come into equity merely to turn deviſee out of poſſeſſion. In *Anſtis* v. *Dowſing*, *Your Lordſhip* allowed the plea by deviſee to a bill by heir to be let into poſſeſſion and account of rents and profits. Suppoſing the tenants do not pay, they cannot change the poſſeſſion. In the caſe of Sir *Jacob Banks*'s eſtate the tenants brought a bill of interpleader, which *Your Lordſhip* refuſed. As to the waſte it is begging the queſtion to ſay, this deviſee cannot commit it, if there was any: but the timber alleged to be cut down is only copſe-wood, and cut in a regular and uſual way: but defendants do not oppoſe an injunction to ſtay waſte generally.

LORD CHANCELLOR.

Then I will give my opinion now, the whole merits being fully before me. The only part, of which I had a doubt, was as to the injunction to ſtay waſte; for certainly when an eſtate is thus Waſte. Guardian or truſtee for infant having a

contingent eſtate, cannot cut timber on ſuggeſtion that it will not improve, though growing among underwood.

thus *in brigâ*, and a perſon is thus in receipt of the rents and profits only for an infant, that infant having no certain right to the eſtate, but a contingent deviſe over to the Plaintiffs, it is going too near the wind for ſuch a guardian or truſtee to cut down timber on a ſuggeſtion, that it will not improve. There is a great variety of judgment upon that, which will admit of diſpute. On the other hand it is not to be ſaid, the cutting down ſuch wood is waſte on the eſtate. Timber growing among underwood muſt be cut down not to prejudice the underwood, that it may thrive, eſpecially in an eſtate ſo near *London* where underwood bears a great price: however it is too much for ſuch a truſtee to do, and there is no harm in granting an injunction to ſtay waſte, which is ſubmitted to.

I am of opinion under the circumſtances there is not ſufficient ground to order a receiver; which might prejudice ſome of the parties, and the infant; which I ought not to do without a neceſſity; and that does not appear. It is aſked variouſly, againſt the infant and the infant's title. It is not aſked by the crown; which could not bring a bill here for it, having taken a proper method to eſtabliſh its title in a court of revenue, where it is properly under conſideration. Then I muſt conſider it barely as a motion on the part of a remainder man, if the intail is not barred: but there is no ground before me to make a doubt of that. It is applied for on the part of the heirs at law claiming in contradiction to the will, if not well executed or the deviſe not good. There is nothing before me to create a doubt as to the execution: all that is ſaid is, that ſuppoſing the will well executed, the deviſe would be void; and that ſuppoſing this child an alien and incapable of taking for her own benefit, that then ſhe cannot take by deviſe. I would not enter into that minutely, nor give an opinion upon it. I cannot indeed cite a caſe, that ſuch a will would be good. I do not remember any doubt or diſtinction made between a grant, conveyance, or deviſe to an alien; for an alien may take; the only conſideration then is, for whoſe benefit, and if he may for the crown. There is no rule of law or upon the *Stat. of Wills* in the way, why he may not take by deviſe: but upon that I give no opinion. Then here is an heir at law controverting the will of his anceſtor; in which he is right; but they come by a bill to have a diſcovery of certain matters as to the title, and of deeds and writings, to ſee how far diſinherited or not: but muſt recover the eſtate, if they can at all, at law. Deviſee is in poſſeſſion: not the infant deviſee, but the perſon to whom deviſed: for it is more than a power. *Power* is not the word in the will; and the words are ſufficient to amount to a deviſe of the rents and profits until twenty-one, *&c.* and this perſon is in poſſeſſion. Then there is no inſtance, in which the court has

Alien.

Whether alien may take by deviſe.

Heir muſt recover at law againſt deviſee.

has ordered a receiver for benefit of an heir at law; for to that I bring it; as it would be another thing, if aſked for the infant: but an heir at law under ſuch circumſtances and ſuch a conteſt muſt recover by the ſtrength of his title at law. The poſſeſſion muſt be taken to be a lawful poſſeſſion; the will gives countenance to it; and the court does not appoint a receiver. As often as it is aſked, unleſs particular circumſtances in the caſe, ſo often has it been refuſed. But what would be the conſequence of it? The plaintiffs, who apply, are aware of it themſelves. The child has nothing out of the perſonal eſtate, which is given to the mother; but 300*l. per ann.* is allotted for this child: the plaintiffs are ſo aware, that it would be a ſtrong objection to the appointing a receiver, that they ſubmit that the court may allot this 300*l. per ann.* for the child, as otherwiſe it muſt ſtarve. But it goes farther; for if the will is good, (of which nothing is laid before me to doubt) Mrs. *Dupleſſis* is intitled to 900*l. per ann.* beſide, out of the eſtate. Then I cannot ſay, ſhe is in poſſeſſion of this eſtate merely for benefit of another, *viz.* the child or whoever can claim in the event of the child's dying. She is in poſſeſſion ſo far for herſelf, until the will is ſhewn not to be good. Then I cannot appoint a receiver in the preſent ſtate of the caſe to deprive the defendants of this 1200*l. per ann.* but it goes farther ſtill. How is the ſuit to be defended, if I ſhould do that? The infant has no other property. If becauſe there is a conteſt between the heir at law and deviſee, the court ſhould appoint a receiver, and this deviſee has nothing to defend his title with, that may be a mean to make an end of the cauſe one way, but would introduce a precedent, that might go a great way, and have very fatal conſequences as to deviſees, by ſtripping them of any thing to defend their right. As to the tenants not paying, an expectation of a motion for a receiver will cauſe that; beſide there is no great arrear. It is impoſſible to grant this part of the motion under all theſe circumſtances.

Barwell *verſus* Parker, *July* 22, 1751. Caſe 116.

Intereſt.

Truſt term by deed for debts and legacies: ſimple contracts carry not intereſt. So if by will, otherwiſe if by deed in nature of a ſpecialty. *ſee 2. Atk. 110.*

SIMON BARWEL having by deed created a truſt term for payment of his debts and legacies after his deceaſe out of his real eſtate, the plaintiffs demanded intereſt for their ſimple-contract debts, though the court in general does not decree intereſt for them; *Car* v. *Lady Burlington*, 1 *Wil.* 228. was cited that where a truſt term is raiſed for debts, ſimple contract become as debts due by mortgage, and ſhould carry intereſt; and *Maxwel* v. *Wettenhal*, 2 *Wil.* 27, where the ſame was held, when the lands were deviſed for payment of debts.

LORD

LORD CHANCELLOR.

1754.
Poſt. Lord Bath v. Lord Bradford. Oct. 26, 1754.

There is no colour for this demand upon this truſt term notwithſtanding the authority cited; for if a man by will creates a truſt out of real eſtate for payment of debts and legacies in aid of perſonal eſtate, there is no caſe, in which the court has ſaid, that ſhall make ſimple contract-debts carry intereſt.† It would be moſt miſchievous, and would make people afraid to do that, leſt they ſhould bring a great burthen on their eſtates by changing the nature: and the conſtant courſe of decrees in this court ſhews the contrary. This truſt term is not created by will, but deed: but it is of the ſame nature, as is uſually by will, being to raiſe money to pay legacies alſo ſo far as his perſonal eſtate ſhall not extend to ſatisfy, and no farther. That will not have the effect to turn ſimple contract-debts ſo far into the nature of ſpecialty-debts as to carry intereſt. If indeed a man in his life creates a truſt for payment of debts, annexes a ſchedule of ſome debts, and creates a truſt term for the payment, as that is in the nature of a ſpecialty, that will make theſe, though ſimple contract-debts, carry intereſt. That is a very different caſe. As to *Car* v. *Lady Burlington* it is not particularly ſtated in *P. Williams*; for the clauſe, that no debts ſhould have a preference, as there ſtated, was not all, on which Lord *Harcourt* probably went. What Lord *Harcourt* there ſays as to the two funds, is contrary to the uſual courſe, wherever two funds are created for creditors. Next as to what he ſays at the latter end, (for which the caſe was cited) what he went on does not appear, but probably on that clauſe for payment of debts in proportion; the particular words of which are not ſtated. That clauſe might be ſo penned as to ſhew an intent in teſtator to put ſimple contract-debts on the ſame foot as ſpecialty as to carrying the intereſt, and to put them on equality: but there are not ſuch words in this deed, being only a general truſt, juſt as if done by will, and ſtill a power of revocation, and not intending to alter the nature of them.

† See however the case of Bothomley & L. Fairfax Melvn. MSS. R. vol. B. 240. with the extract from the decree in 1. P. Wms. 334. in a note by Mr. Cox in his new ed. of

Next a queſtion was made, whether *Barwel* ſhould be charged with intereſt of money put into his hands to be placed out.

LORD CHANCELLOR.

Scrivener, &c. bound to place out money received, for which he gives a note, and is not diſcharged

Where an attorney in the country or money-ſcrivener takes money of his client or cuſtomer into his hands, and gives a note to place it out at intereſt, he is bound to do ſo. If he places it out on ſecurity, and the client, *&c.* accepts the ſecurity, and accepts the intereſt thereon from the time, that is a diſcharge of the perſon

ſon receiving the money from anſwering the intereſt any farther: but if he does not place it out, or if he does, and does not deliver over the ſecurity, and declare the truſt for his client, he is anſwerable for it himſelf, and muſt anſwer the intereſt. The court will indeed allow him a reaſonable time for placing it out, before he ſhall be charged therewith: but he ſhall not keep it in his hands for ever without placing it out according to the intent. Therefore as to what *S. Barwel* has placed out at intereſt, and the ſecurity accepted of and agreed to, he muſt not be charged: but his repreſentatives muſt anſwer intereſt from the end of three months for other ſums, the ſecurities for which were not agreed to.

from intereſt, unleſs the ſecurity and intereſt are accepted by the employer.

Next *Lord Chancellor* held, that the balance of a ſtated account ſhould carry intereſt; that it will do ſo between merchants accounts; of which ſeveral inſtances: but the account having been ſtated long ago, and no claim made of an allowance for trouble, there ſhould be none now: for it muſt be taken as evidence, that the perſon though adminiſtrator did not think himſelf intitled to any, as none was then demanded.

Intereſt on ſtated account. No allowance for trouble, if not demanded, though in caſe of adminiſtrator.

Jones *verſus* Clough, *July* 22, 1751. Caſe 117.

At the Rolls.

ON the marriage of *Thomas Clough* an eſtate was ſettled to uſe of himſelf for life, remainders in the common manner. When *John* the eldeſt ſon, and *Thomas* the younger, came of age, articles were entered into, reciting the ſettlement, and that "whereas "there was thereby no proviſion or portion of maintenance for "younger children, though ſeveral were now living, to the intent "therefore that 300*l.* may be raiſed, *Thomas* the father, *John* the "ſon and heir, and *Thomas* the younger, have taken it into conſi- "deration and agree, that 300*l.* be raiſed in and upon all or part "of the premiſes from and immediately after the death of *Thomas* "the elder, and to be paid to ſuch younger children in ſuch man- "ner and form, as he ſhall by his laſt will *duly executed* direct and "appoint; and in order to have the ſame effectually done and aſ- "ſured, the two ſons do covenant, grant, promiſe and agree "jointly and ſeverally for themſelves, their heirs, *&c.* that after "father's death any part might be granted, mortgaged, or diſpoſed "of for raiſing the 300*l.* to be paid as the laſt will and teſtament "of *Thomas* the elder ſhould direct and appoint, and to no other "uſe."

Father tenant for life and two ſons article to charge with a ſum for younger children after father's death, as he by will duly executed ſhould direct: he directs by will with two witneſſes only: a good execution of the power, nothing paſſing from the father: otherwiſe if by owner of the eſtate.

{ See before 76.

The father by will, atteſted only by two witneſſes, particularly diſtributes this 300*l.*

John dying without iſſue, having ſuffered a recovery of part, *Thomas* became tenant in tail of the reſt, and now inſiſted, that the proviſion, made for himſelf and the reſt of the children, cannot take effect as not a proper execution of the power, the will not being ſuch as would paſs lands according to the ſtatute of frauds, all the requiſites of which were required by theſe articles, and the addition of duly equal to *legally*. *Wagſtaff* v. *Wagſtaff*, 2 *Will.* 258. *Longford* v. *Eyre*, 1 *Will.* 740.

Sir *John Strange*.

Where the owner of an eſtate in land either in law or equity reſerves to himſelf a power to diſpoſe of it to ſuch uſes, as he by will ſhall appoint, that muſt be ſuch a will, as within the ſtatute of frauds would be proper for a deviſe of land; otherwiſe the ſtatute would be entirely evaded: but the queſtion is, whether this is ſuch a caſe as that, for which the authorities cited are in point? The ſolemnities in the ſtatute are required only in deviſes of lands, but it goes no further. Conſider whether the father by the articles or will parts with any thing in his power to give. By the ſettlement he was bare tenant for life; and by the articles has granted nothing, being to take effect after his death. The agreement indeed is recited to be between the father and two ſons, and refers to the act of the father by will duly executed: but in the next clauſe, which is to charge the eſtate, the two ſons only covenant and grant to the truſtees, that this 300*l.* ſhould be a charge; and it is upon their eſtate; and the intervention of the father is only to apportion the ſums: it is not his will, that actually makes the charge: he is only referred to as a proper perſon for that. This caſe is attended with ſuch circumſtances, that the court is well warranted to go as far, as they can, to relieve the perſon ſtanding in the place of the younger children, eſpecially againſt him who was to have the benefit of the articles, but who by accident of his brother's dying without iſſue turns the tables, as more for his benefit to ſay they ſhall not be carried into execution. He might have been greatly benefited by the articles; for the father might have appointed any given ſum, ſo as to have diſtributed ſomething to all, and 290*l.* to *Thomas*. The word *duly* is in the agreement, as recited, but not in the covenant of the two ſons. But it is not neceſſary to lay any great ſtreſs on that; becauſe, ſuppoſing it was the caſe of the owner of an eſtate reſerving to himſelf a power by will without adding *duly* or *legally*, I admit, in ſuch caſe his act muſt be ſuch, as anſwers the utmoſt idea of the word *duly*, though *will* is only mentioned. But certainly there may be caſes, where the words *duly executed* may not require the ſolemnity of the ſtatute of frauds; for if no lands are given by the perſon making the will, that will will be duly executed, though there are not thoſe witneſſes, the ſtatute requires; becauſe

becauſe thoſe words muſt refer to the nature of the act, and the nature of that which paſſes by it. Yet if the word *duly* was to be conſtrued otherwiſe, there have been caſes, where a court of equity under ſuch circumſtances would ſupply it. *Sayle* v. *Freeland*, 2 *Ven.* 350. which is ſtronger, becauſe there the act referred to was the act of the owner of the land, not of him who had no power or dominion over that, which was to be ſo given: and yet it was held, a court of equity would ſupply that little circumſtance, becauſe the intent was fully declared. Here two perſons, who had power to charge this eſtate, have done it by articles, but refer to the act of a third merely for the purpoſe of apportioning; and though that third happens to be a father, it would be the ſame as a mere ſtranger: if therefore one ſhould charge his eſtate with a ſum, to be divided as a mere ſtranger ſhould think proper by will, the neceſſity of its being a will conformable to the ſtatute does not occur; and whether two or three witneſſes, it is ſuch a circumſtance, as, when the intent fully appears as in the preſent caſe, a court of equity would ſupply. In *Smith* v. *Aſhton*, 1 *C. C.* 264. it was held good in a court of equity, the ſubſtance being performed. How ſtands it here as to the ſubſtance? It is not neceſſary to criticiſe very nicely on the import of the word *duly*: but where a proviſion for younger children is thus attempted to be defeated by one, who was a younger child, one would lay hold of any circumſtance whatever, on which any weight was to be laid: and ſuppoſing the father having no landed eſtate executes a will, whereby his intent is ſufficiently declared, in what manner this ſhould be divided, it is good, though there are not ſuch circumſtances as required, whereby an intereſt is to paſs from him. There is no occaſion to conſider, whether the whole muſt have fallen to the ground, if the father had made no will or appointment, or whether the court would in ſuch caſe have interpoſed for the younger children. There have been caſes, where a proviſion of that ſort has been referred to the act of a third perſon, which, if not executed, this court has thought proper to direct to be equally divided: but that need not now be determined, becauſe I am of opinion, this will, though executed in preſence of two only, conſidering it as a will whereby the father paſſes nothing at all by way of intereſt from himſelf to them, but merely as a collateral perſon, is ſufficient within the authorities mentioned to warrant this opinion of the court, that it is a proper execution of this power.

Power to another to appoint for younger children, if not executed, to be equally divided.

See 1 Vern. 66. 2 Vern. 181. 665. 1 Ves. 60. & Madox v. Andrew 6 Jodr. MSS. R.

Aſhly

Caſe 118. Aſhly *verſus* Baillie, *July* 24, 1751.

Maſter of the Rolls for Lord Chancellor.

Real aſſets followed by legatees.

A diſtinction between creditors and legatees; creditors not having a right to the benefit of adminiſtration bonds.

WILLIAM BARNSLEY by will gave 3000*l.* not expreſſly to the plaintiffs, but left it nominally to his executrix *Mary Pocock*, who declared it to be in truſt for the plaintiffs, and covenanted accordingly to pay it. Upon her dying inteſtate, her brother *William* took out adminiſtration to her and alſo *de bonis non* of *Barnſley*, and entered into bonds to the ordinary, the conditions of which were according to the ſtatute of diſtribution. Theſe bonds ſtood out during his life, were not put in ſuit, nor any thing done on them. On his death he made his ſiſter *Sarah* deviſee of all his real and perſonal eſtate. The perſonal eſtate of firſt teſtator not having been adminiſtered as it ought, the bonds are put in ſuit againſt the heir at law of *William* and the deviſee. The heir pleaded nothing by deſcent; deviſee admitted in her plea to the action, that ſhe as deviſee of her brother had real aſſets of his in her hands, and ſtated particularly, what they were.

The queſtion was, whether plaintiffs were intitled to the benefit of theſe bonds entered into, and on which judgment had been recovered; for that though this demand of plaintiffs was originally teſtamentary, it was now to be conſidered as a debt, and theſe bonds had nothing to do with it? It is now a ſettled diſtinction in *Lev.* and *Sal.* 316. that a creditor *eo nomine* has no right to have the benefit of theſe bonds to the ordinary; which were originally intended only to aid the juriſdiction of the Eccleſiaſtical court, which did not extend to give remedy for recovery of debts. In the caſe cited for plaintiffs of *Greenſide* v. *Benſon*, 6 *March* 1743. *Lord Chancellor* held, a creditor might proſecute in Eccleſiaſtical court for an inventory, but could not litigate that inventory.

For plaintiffs. The reaſon, the creditor or archbiſhop cannot aſſign a breach in non-payment of a debt, though it is a due courſe of adminiſtration to pay a debt, is, becauſe the archbiſhop's court cannot try a debt; though of that there would be ſome doubt, if there were not caſes to that purpoſe: but ſtill a jury may try it. A breach may be aſſigned before the archbiſhop, that an inventory has not been given; which is the moſt minute breach, that can be; for a man may ſtill be honeſt. That breach was aſſigned in *Greenſide*'s caſe on an action in the archbiſhop's name, and held ſufficient foundation to recover in law the penalty of the bond: the obligors coming here for relief, *Lord Chancellor* ſaid, you ſhall have no relief

lief in a court of equity againſt the penalty of that bond, until you have ſhewn, you have paid that debt.

Two incumbrances were ſet up by Lady *Blunt* as prior to the plaintiffs; the firſt a mortgage before the judgment on theſe bonds: next a ſecond mortgage made after the judgment, and as ſhe inſiſted, without notice of that judgment. Plaintiffs inſiſted, though no notice was given perſonally to her, there was to her agent; which is the ſame: otherwiſe no notice can be proved. Though one has the law of his ſide by having the legal eſtate, yet if he will by a voluntary act take a thing with notice of another's equitable right, it muſt be ſubject thereto; and then the common rule does not hold, that he, who has equity and law of his ſide, ſhall prevail againſt equity alone. That is not the caſe of a purchaſer with notice of another's prior right. The caſe of Lord *Falconbridge*, cited on the other ſide, was only this: Mr. *Piggot* had been concerned as counſel to look over a title: a great many years after the title-deeds were laid before him, the queſtion was, whether he was bound to remember every particular caſe of a title, that came before him in the way of his practice? He did not remember: the court was of opinion, a counſel is not to be ſuppoſed to remember every ſuch thing: but there is vaſt difference between an attorney or counſel and an agent, which is the preſent caſe, being agent for her in placing out the money, not merely looking over the title. Notice.

Sir *John Strange.*

As to the firſt queſtion conſider, in what light the plaintiffs are before the court; whether ſtill as legatees under the will of *Barnſley*, or as having in a manner annihilated that demand in that light, and ſet it up only on the foot of creditors under the declaration made by the executrix; who, conſcious of what teſtator intended, and that ſhe was only a truſtee for that, declared it ſo: but that is a tranſaction on her part only, and nothing done by plaintiffs to depart from any right to follow ſtill the aſſets of *Barnſley* until ſatisfaction was attained from one hand to another, and therefore ſtill to be conſidered in this court as proceeding for that legacy: for a court of equity will conſider that perſon as legatee, for whom the truſt is. The judgment on the plea of the heir is not material; but ſince the ſtatute of fraudulent deviſes they have a right to follow the real eſtate into the hands of the deviſee, and accordingly actions are brought on theſe bonds againſt deviſee of the real eſtate. Theſe actions are brought on the obligatory part of the inſtrument only, as all ſuch actions are. Defendant thereto has a right to pray *oyer* of that condition, and plead performance generally; and that puts the plaintiff on aſſigning a breach. That was not done in the preſent caſe; but ſhe very prudently diſcharging herſelf from any

difficulty, farther than as that eſtate came to her hands, for which ſhe is liable as deviſee. The plaintiffs then will be intitled to have the benefit of theſe bonds in common with others, for whom they are ſuppoſed to be in truſt. The plaintiffs are *prima facie* legatees; and as ſuch the bonds are properly in truſt for them. There is indeed that diſtinction between creditors and legatees: but I cannot ſee, upon what ground it was: however it certainly is not now to be diſputed. The plaintiffs are therefore intitled to pray in aid, but in common with all other legatees, and under the judgments obtained on theſe adminiſtration-bonds to have ſatisfaction as far, as that will extend under the circumſtances of prior incumbrances; which are next to be conſidered.

Notice to agent, placing out money on mortgage, of a prior judgment, ſhall affect the employer.

The firſt being advanced long before the judgments on theſe bonds, Lady *Blunt* muſt be conſidered as an incumbrancer prior to any right theſe bonds can give to come in on the real aſſets of *William* the brother. As to the other, which is admitted to be advanced ſubſequent to the judgments, it is not pretended, ſhe had any notice of theſe judgments intervening: but it is inſiſted, there is a ſpecial caſe of notice made out to her agent in that tranſaction, ſufficient to poſtpone it to the ſatisfaction, which may be claimed as to the judgment on theſe adminiſtration-bonds. I ſhould have no doubt, but that it would be carrying it a great deal too far againſt an agent in general, or counſel, or attorney, to ſay that, becauſe in a former ſuit ſuch deeds came to their ſight or knowledge, or ſuch a tranſaction was had in a matter, that could not be ſuppoſed to make any impreſſion as to any future event, that ſhould have the effect of conſtructive notice: that would be too hard to ſay: that therefore was the determination in the caſe cited and other caſes. God forbid, it ſhould be conſtructive notice, that they had an abſtract of ſomething of this ſort brought before them, and therefore their memory ſhould be charged therewith. But the queſtion is, whether there is not ſuch a preciſe circumſtance, as is ſufficient to warrant the court to conſtrue this to be notice. That circumſtance is, what is diſcloſed in the anſwer of Lady *Blunt* and her agent; neither of which pretend, that her agent did not know of theſe judgments; and ſhe admits, ſhe employed him in putting it out. He knew of theſe judgments intervening: but thought, it was not proper to take notice of it, becauſe he thought, there was enough to pay all. It is on that particular circumſtance, and his admitting knowledge of it, which is actual notice of that before the money advanced, and then in a court of equity ſhe will not be intitled to take place of the judgments on theſe bonds preceding thereto.

No conſtructive notice from title deeds, &c. laid before counſel, or attorney, or any thing that could not be ſuppoſed to make an impreſſion on the memory.

Biſhop

Biſhop *verſus* Church, *July* 25, 1751.

Caſe 119.

l. c.
Ante ~~100~~ 100.
12 Dec. 1750.

One obligor in a joint bond dies: the other becomes bankrupt: though the legal lien is one, if no partiality or colluſion by obligee, equity will ſet up his demand againſt both heir and executor of the deceaſed; but the real only in default of perſonal aſſets.

Obligee unleſs paid, not obliged to lend his name to ſue ſurvivor.

Though the obligations and penalty gone, the condition is conſidered as agreement to pay.

THIS cauſe coming on again after the examination of Mr. *Clive*, it was inſiſted, that the heir at law of *James Church* was in this caſe not bound; and that wherever the heir at law has the good fortune not to be named, there is no inſtance of that defect being ſupplied againſt him.

LORD CHANCELLOR.

The grounds of the deciſion in this caſe lye in a very narrow compaſs. I am very glad of this further examination, it giving a great light and ſatisfaction as to the equity, and more than I expected, ſtrengthening my opinion on the firſt queſtion; for there were two queſtions in the cauſe: firſt, whether the plaintiff has an equity to recover this debt againſt the repreſentatives of *Church*? The ſecond, ſuppoſing there was, whether there was not a rebutting equity for the defendants to bar that as loſt by neglect of his own? My opinion upon the firſt is ſtrengthened, by what appears in this examination, though not intended for that; for it appears, the 2000 *l.* borrowed on theſe two bonds is confeſſed to have been borrowed in the courſe of trade as partners; as appears from a bill brought by the executors of *Church* againſt *Selim Owen*; farther alſo, in that very bill the plaintiffs pray, theſe bonds may be diſcharged as affecting the aſſets and effects of *James Church*: ſo that they take it to be of that kind, and that they were liable out of aſſets of their teſtator to make ſatisfaction for thoſe bonds: which is a very ſtrong corroborating circumſtance on the firſt point, and is an anſwer to all the diſtinctions attempted at the former hearing. But this has alſo given a great light, and furniſhes an anſwer to all objection againſt plaintiff's recovering; *viz.* whether *Biſhop* had not been guilty of ſo groſs a neglect of recovering, or preventing the repreſentatives of *Church* from recovering, as to loſe his remedy in a court of equity as well as he had loſt it at law? Every thing ariſing between *Owen* and the repreſentatives of the deceaſed partner is entirely out of the caſe in reſpect of the plaintiff and of *Biſhop* in his life; for nothing, they could do as between themſelves without his conſent, could at all vary the right or remedy, *Biſhop* had either againſt *Owen* in law or equity, or againſt the repreſentatives of *Church* in equity: it was all *res inter alios acta*. Biſhop might indeed by his own act part with his right by his behaviour, and rebut his equity, he would otherwiſe have: but upon *Clive*'s applying to him to get in the money of *Owen*, *Biſhop* tells him, he is content with the ſecurity; the intereſt is paid him, and therefore he is not obliged to do ſo. A man may make that anſwer; becauſe he likes the intereſt, he receives,

receives, and has no objection to the ſecurity: but ſurely nothing ariſing from thence will bar him from any remedy in law or equity. He has his election. As to the farther requeſt, repeated more than once, for putting the bonds in ſuit in his name to recover the money of *Owen*, I am of opinion, he was not obliged to do that but upon ſuch terms, as he offered to do it, and the only terms on which a court of equity would give relief; for I am not to inquire, whether a man might not act more kindly or generouſly. Where a juſt debt is due, a demand againſt one in law and equity, and againſt another in equity, if a bill had been brought, the court would have relieved on payment of the principal and intereſt to *Biſhop*, and leaving them to recover that againſt *Owen* to proſecute that decree in *Biſhop*'s name: but no relief would be, until after the repreſentatives of *Church* had paid the money. The terms, on which *Biſhop* agreed to *Clive*'s propoſal, were on paying him off his bonds. That is the ſtrict equity between man and man as well as of a court of equity; and whether he would have acted more kindly in letting them have his name to put the bonds in ſuit, to regard that, would make ſuch ſuch remedy very precarious. There are ſeveral inſtances of mortgages, where there are many attempts by mortgagor to pay them off, and reaſonable offers of payment; yet if a ſtrict tender is not made, the court cannot ſtop the intereſt: though caſes may be, where the court would wiſh to do it: that of acting a more generous kind part, if mortgagee had taken it, is not what the court is to go by. Nothing of that kind was done or tendered to *Biſhop*; no offer of payment at all. It is not reaſonable, taking it ſtrictly, to expect that from any man having two bound for his debt. A man who has received his money, is ſafe in all events; therefore out of danger however faintly the ſuit is proſecuted: but if he had lent his name without payment, and judgment had been againſt him, he never could bring another action upon that bond. It certainly is therefore liable to accidents; and a man then truſts the merits of his demands and of his bond to another: which is not reaſonable. But it is ſaid, *Owen* might have pleaded that payment was made by repreſentatives of *Church*: and certainly on the act of parliament for amendment of the law this great difficulty ariſes, that if one of two obligors pays off the money, the condition being forfeited by the day being paſt, and puts the bond or ſuit againſt the other in name of obligee, the other may plead, that the other obligor has paid the principal and intereſt on that bond before bringing the action; and, I believe, inſtances of that have been, of bills in this court for relief: but that depends on proof of the payment. But *Owen* could not plead ſo; for no man can plead payment of money on a bond at a day or after the day but by the obligor: he cannot plead payment by a ſtranger; for that is demurrable; it is no plea: he muſt plead payment by himſelf or ſome perſon bound in law to payment, which could not be done in this caſe;

If ſtrict tender not made by mortgagor, intereſt is not ſtopt.

If one obligor pays, and ſues the other at law in name of obligee, payment may be pleaded: but not payment by a ſtranger, as repreſentative of deceaſed obligor in joint bond is.

caſe; for by the death of *Church* in life of *Owen*, the repreſentatives of *Church* were to be conſidered as ſtrangers; therefore it could not have been pleaded: but ſuppoſing it could, and that nicety out of the caſe, what would it have brought it to then? only to the equity of the caſe, to compel him by bill here to have a contribution, or to pay the whole, if he was liable to the whole. A proper bill was depending in this court; and the court would have directed, that *Owen* ſhould have paid, or at leaſt have reſtrained him from pleading the payment by the repreſentatives of *Church* at law. A bill had been brought by the repreſentatives of *Church* againſt *Owen* to call him to an account of the debts due on either ſide, and compel him to pay. That was proper for them to do; and they ſhould have proceeded in that cauſe; which it does not appear they did, though five years paſſed to the death of *Biſhop*. Plainly therefore there is no ground for a court of equity to ſay, the plaintiff ſhall be ſtripped or rebutted of this equity from a partial favour and indulgence to *Owen* and colluſion with him. The terms required by *Biſhop* on their propoſal, is a clear anſwer thereto. Had they complied with them, they might have taken thoſe bonds, and arreſted *Owen*; which would have been no favour to him. Another ſtrengthening circumſtance is, that the executors plainly did not think, any thing, that paſſed between *Biſhop* and *Clive*, had rebutted this equity, or diſcharged them from being bound. There was no occaſion for them to apply to the repreſentatives of *Biſhop* to put the bonds in ſuit, (which was done, and occaſioned the bankruptcy), if they thought ſuch a defence could be made. They thought themſelves ſtill remaining liable; and I am of opinion, they are ſo far as not received out of the commiſſion of bankruptcy againſt *Owen*.

The next conſideration is as to the heir at law. I am of opinion, the plaintiff has the ſame equity againſt him. In all the caſes where two, their heirs, executors, and adminiſtrators are bound in a joint bond, and by death of one in life of the other the legal lien and action at law has been gone, if a court of equity has allowed the equity, and ſet up the bond, they have always ſet it up not only partly, againſt the perſonal eſtate and executor, but againſt the heir alſo; becauſe that is a very different caſe from that, which was put, where the heir was not named. Here he is named in the condition and bond alſo. Then conſider the caſe of *Aſton* v. *Pierce*, 2 *Ver.* 480. So *Probat* v. *Clifford*; where, though a joint covenant only, not ſeveral, I ſet it up, and againſt the heir as well as executor. So in *Welſh* v. *Harvey*. The reaſon the court has gone upon is, that the bond is conſidered as an agreement in writing; and therefore, though the obligation and penalty is gone by the legal demand being gone, yet

Ante.

Ante.

yet the condition, taking it altogether, is conſidered as an agreement in this court to pay the money, and an agreement under hand and ſeal; therefore in *Acton* v. *Peirce* the court conſidered that condition as an agreement, and ſet it up againſt both executor and heir. There is as much reaſon to conſtrue this as an agreement for heirs to pay as in other caſes. That is the reaſon, though the formal part is gone: but the real eſtate comes in only in default of perſonal aſſets.

Caſe 120.

Price *verſus* Lloyd, *July* 26, 1751.

Ante July 13, 1750.

ON the Maſter's ſpecial report it appeared, that the witneſs to the will at the time of this ſecond examination was not a creditor of teſtator; and it not appearing that at the time of the atteſtation he was, *Lord Chancellor* ſaid, he would not enter into a minute inquiry about that, whether he was or no.

Caſe 121.

July 27, 1751.

On a queſtion with whom infant ſhould reſide, infant's inclination of weight, where no imputation.

MR. *Nicoll* by will appointed Mrs. *Oakaver* guardian of his daughter, who being above the age of ſixteen withdrew herſelf, and preferred a petition complaining of ill uſage and ſeverity. Mrs. *Oakaver* preferred a petition complaining of the infant's behaviour, and at the ſame time renouncing all further care and trouble, but joined with all the reſt of the daughter's relations in requeſting, that ſhe might be put under the care of, and reſide with, Mr. *Tracy*, who was himſelf a relation: but the infant deſired Mr. *Hexeter*, a ſtranger and no relation to the family, only a neighbour of her father's, might be the perſon.

It was ordered to be referred to a Maſter to ſee, which was the proper perſon. The Maſter reported in favour of Mr. *Hexeter*, chiefly upon the great diſinclination ſhe expreſſed to go to Mr. *Tracy*. Exception to the report. Several affidavits were read on both ſides: it was argued that little weight ſhould be laid on the inclination of infants; for that would be very dangerous, were they allowed to have the nomination of their guardian; a ſcholar might then apply to change his ſchool as not liking it.

LORD CHANCELLOR.

Though in ſuch a caſe of a ſcholar I ſhould lay very little weight on his deſire: yet in this of a young Lady near 17, above the age of puberty and marriage, (though perhaps the canon law has

has fixed that age too low, for reaſons which hold not here), and that alſo in a queſtion, not whether the court ſhould remove a teſtamentary guardian or no, that guardian having renounced, but only a queſtion with whom the infant ſhould reſide, and who ſhould have the perſonal care of her education; I think, weight ought to be laid on the inclination of the infant. In ſo doing I ought to go a little farther than even the law does; for ſuppoſing there was no teſtamentary guardian, nor a mother, if the infant has any *ſocage* land, and is of the age of twelve if female, of fourteen if male, they are allowed to chuſe their guardian; as is frequently done on circuit, and is the conſtant practice, and what this court frequently calls on infants to do: though this ſtill is liable to any reaſonable objection made to ſuch choice. But there is no imputation on Mr. *Hexeter*: and this is not a caſe who ſhould have the guardianſhip, which Mrs. *Oakaver* will ſtill have, but only of the perſonal reſidence.

If no teſtamentary guardian or mother, infant having ſocage land may chuſe guardian at 12 if female, 14 if male: done on circuit if no reaſonable objection.

The exception was diſallowed; and it was ordered, that the perſon concerned in her withdrawing, ſhould not have acceſs to her; and that ſhe ſhould not be married without leave of the court.

Pitcairne *verſus* Ogbourne, *July* 29, 1751. Caſe 122.

At the Rolls.

BILL to be relieved againſt an annuity-bond entered into on the marriage of plaintiff's ſon with *Rebecca Grovenor*, niece of *Felix Chambers*; whereby it was ſtipulated, that the plaintiff during his life ſhould pay 150*l.* *per ann.* to the huſband and wife, if ſhe ſurvived him. She did ſurvive her huſband: the bill was to reduce the payment to 100*l.* *per ann.* upon an agreement, ſaid to be entered into between theſe parties previous to the marriage; whereby though the bond was to import payment of 150*l.* yet for reaſons given on the tranſaction the actual agreement was for 100*l.* only.

Parol evidence admitted to ſhew, that though a bond on marriage was for 150l. per ann. yet the agreement was for 100l. but the bill diſmiſſed, as being a private agreement to deceive a material party.

The plaintiff's reading parol evidence of this agreement was objected to. The court notwithſtanding the ſtat. of frauds ſometimes goes into parol evidence; as where the ſtatute would otherwiſe be the occaſion of fraud; which was the caſe of *Walker* v. *Walker*, *Dec.* 11, 1744; where on bill for performance of agreement for ſurrender of copyhold it was inſiſted, that the agreement was alſo, that the other ſhould reciprocally ſurrender his copyhold for benefit of defendant's ſon; parol evidence was admitted, as it was ſetting up an agreement to be performed on

the other part as a conſideration of the former agreement, not to contradict it. So in the late caſe of *Legal* v. *Miller*, it did not contradict, but came in on a new agreement. But it is never admitted to contradict the written agreement, and to ſupport a fallacious, private one, entered into to deceive the perſon, who had the diſpoſal of the wife, as here; this bill being to eſtabliſh a fraud to which the plaintiff himſelf is a party. *Necis artifices arte perire ſua*, a good rule in morality. It is of publick concern. There is no inſtance, where a written agreement on marriage notoriouſly between the parties, that this court ever admitted evidence to prove a private, clandeſtine treaty that the agreement ſhould not avail, what on the face it imported.

Ante June 10, 1751.

Sir *John Strange*.

Parol evidence admitted to prevent fraud.

The ſtat. of fauds ſays, all contracts in conſideration of marriage ſhall be in writing, otherwiſe void, *i. e.* if people by parol only treat for a ſum of money to be advanced on one ſide and an eſtate ſettled on the other, if not reduced into writing, it ſhall be void. However there may be caſes, wherein courts of law and equity (and the rule is the ſame in both) will let in circumſtantial evidence to prevent that fraud taking place, which would ariſe from inſiſting, that ſomething was got into writing, which would deprive the party of the benefit of detecting that fraud.

Written agreement diſcharged by parol.

On a bill for ſpecifick performance of a written agreement, the defendant may inſiſt, it has been ſince diſcharged merely by parol between the parties; and that defence will be received. 1 *Ver.* 240. on which authority chiefly *Legal* v. *Miller* was determined; where I admitted the evidence offered. The ſame objection was made there as here, that the written agreement ſhould ſpeak for itſelf, and no evidence could be admitted to the contrary: but the court received evidence to the contrary, and on that diſmiſſed the bill for ſpecifick performance, and with coſts. *Walker* v. *Walker* was there cited, where notwithſtanding the objection, *Lord Chancellor* allowed the evidence to be read: though he ſaid, it might be doubtful, had the defendant been plaintiff, for that leſs evidence would ſuffice to rebut an equity than to obtain a decree. The preſent evidence offered is not to contradict the import of the bond on the face of it, but to ſhew that notwithſtanding, the agreement was that it ſhould be but 100*l.* which is expreſly contradicting the agreement itſelf: but it is admitted, the written inſtrument is, as it was deſigned, to appear at the original tranſaction. It differs therefore from the caſes, where you come on the conſtruction of the inſtrument to abate, what ariſes on the force of the face of it. This is in fact ſetting up a new agreement. I remember a caſe of *South Sea Company* v. *D'Oliff*, where by the agreement the *Company* were not bound to

Ante. 299.

anſwer

anſwer for any irregularity by ſupercargoes, unleſs information was given in two months after return home. The inſtrument was not drawn up until on board the ſhip and in a great hurry, and executed there by the party; who, when he got out to ſea, and read it over, found it was ſix months inſtead of two; and brought a bill to be relieved againſt that variation in the inſtrument. Lord *King* ſent it to an iſſue: it was tried on a queſtion, whether it was the original agreement, it ſhould be two inſtead of ſix months. Verdict in favour of plaintiff, that the agreement was deſigned to be in two; and a decree in conſequence of that to relieve the plaintiff againſt any difficulty by that variation. That is a ſtronger caſe than this; ſetting up parol evidence to contradict the very words of the written agreement itſelf; but it was conſidered, that the variation would be a fraud, and therefore the court, which was to relieve againſt fraud, muſt admit it: otherwiſe if it could be got in black and white, there would be no relief: from this caſe therefore and others, it is proper to receive this evidence; the weight of it will be afterward for conſideration.

To encounter the ſtrength of the evidence of the written agreement, the caſe, the plaintiff attempted to make, was this. That he being a clergyman with about 200*l. per ann.* benefice, was willing, as far as he was able, to give into his ſon's inclination for the defendant, who had no fortune; he told him, he would agree to pay 100*l. per ann.* and with this propoſal the ſon was to go to wait upon her at her uncle's; that ſhe roſe in her demand by ſaying, that her expectations were from her uncle, having nothing of her own; that her uncle would be induced to do more for her, if he did more for his ſon, and therefore he ſhould let the bond run, as if it was for 150*l.* inſtead of 100*l.* which would be an advantage for her and the children; that he was angry at the propoſal; and the treaty was in danger of being broke off; but by importunity he was prevailed on to execute it; but that ſhe was ſo far from conſidering herſelf as intitled to 150*l.* that they actually received at the rate of 100*l.* and ſhe inſiſted on no more, when ſhe became intitled to it in her own right. On this foundation the plaintiff inſiſted on this agreement in contradiction to the bond; and that the defendant ſhould not avail herſelf from any thing ariſing on the face of the bond againſt her own propoſal, or reject the parol, which was the true agreement: that the anſwer denying poſitively all theſe circumſtances was diſproved by ſeveral witneſſes. It was begging the queſtion to ſay, that plaintiff came into court on the foot of fraud, not of equity. The uncle was not *in loco parentis*; for ſhe had a mother alive at the time: he was only nominally a truſtee in the bond, and and ſo not an intereſted party. This

agreement was with the privity of every party concerned in the marriage-agreement, the father, ſon, and intended wife; the uncle whom it was calculated to deceive, having neither contracted or given any thing on his part, it differs from all the caſes on that head in the material circumſtance, on which they all turn, that it is a deceit to a party. The uncle then cannot be ſaid to be deceived. Though he has by his will made a proviſion for his niece, the huſband is not at all benefited thereby; for it is to her ſeparate uſe. This is like the caſe, where two contract for a ſale, and vendee for ſake of appearances deſires a larger ſum than he really gave, may be inſerted in the conveyance: ſhould vendor afterward inſiſt, he received no more than ſuch a ſum, if it was proved to ſatisfaction of the court, that the real agreement was ſuch, and that it was inſerted merely for that reaſon, he would be intitled to no more in a court of equity, which would interpoſe. So if huſband for the ſake of appearances inſerts in his marriage-agreement his wife's portion to be double; the receipt given is a waver of any more than 100*l.* like the late caſe where two annuities of 10*l.* each was given by will executed according to the ſtat. of frauds; but a codicil by two witneſſes only, reduced them to 5*l.* each: it being alleged in the pleadings that theſe laſt annuities had been accepted, *Lord Chancellor* conſidered that as a waver of the 10*l.* and as a new agreement, and ſent it to a Maſter, to know whether they had accepted. Where a deed imported an abſolute conveyance, on a bill to redeem they have been let in to prove a defeaſance: but plaintiff here not only ſhews the agreement different, but alſo accounts for it.

For defendant. The bill is to eſtabliſh a pretended underhand agreement on treaty of marriage to reduce the publick, open agreement, to carry an appearance to the uncle with whom the treaty was, and on whoſe regulation of it the marriage itſelf depended; ſo that he was the proper party with whom to treat, and not only nominally a truſtee. There is a material letter during the treaty from the plaintiff to his ſon, where it appears under plaintiff's own hand, that the uncle had promiſed to do ſomething on his part, though the plaintiff thought better not to have it inſerted, but to truſt to his generoſity, concluding with bidding his ſon go on to marry, and leave the management of the uncle to him. Falſe inducements and ſpecial appearances are a fraud on the perſon treated with on that foundation. There is nothing in writing to alter the original bond ſtill in force: written evidence at the time cannot err, nor is liable to defect of memory as parol evidence, which is hardly poſſible to remember preciſely at any diſtance. On that principle was the ſtat. of frauds made; which, it would be better and ſafer, if never broke

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in upon, notwithſtanding the ſpecious argument that it may in ſome inſtances cover fraud. Though a third perſon's being defrauded, and induced to give more than he otherwiſe would, is an ingredient, that is not the principle upon which the court goes; which is not to endure any thing underhand, derogatory to the publick agreement: but this the firſt time ſuch was ever endeavoured to be eſtabliſhed by a bill. Sir *Joſ. Jekyll* looked on young people paying their addreſſes in way of marriage as intoxicated, and not *jui juris*. Inſtances have been even of parties to the tranſaction being relieved againſt the underhand agreement, though made by themſelves; 2 *Ver.* 499. 1 *Ver.* 475. and other caſes.

Sir *John Strange.*

Firſt, is the parol agreement, on which plaintiff inſiſts as the grounds and foundation of the relief prayed, in point of fact made out to the ſatisfaction of the court? I think, it is ſuffi ciently eſtabliſhed; and the anſwer, which abſolutely denies every particular of this private agreement is falſified by ſeveral witneſſes, corroborated by defendant's receipt and other acts.

But however ſtrong the evidence may be to falſify the anſwer, and make out the parol agreement, next whether on the whole the plaintiff is intitled in a court of equity to the relief prayed? The general rule as to theſe private agreements is certainly, and admitted to be this; where any ſuch ſtipulations between ſome of the parties is to deceive or draw in any other party to the agreement to do more, than he otherwiſe would, this court looks on it in light of a fraud, and will relieve againſt it. 1 *Sal.* 156, *P. C.* 522, 1 *Ver.* 475, and ſeveral other caſes to prove that general rule. But it is ſaid, this differs, the uncle neither contracting nor giving any thing; which leads to the queſtion, in what light he is to be conſidered? Laying all the tranſaction together, eſpecially the letters of the plaintiff, I am of opinion, the uncle is to be conſidered as a material party to the agreement on the marriage, and as one intended to be impoſed on by the private agreement of the others. Defendant's whole dependance was on him; ſhe lived and continued to live with him to the time of his death; and though probably defendant had a mother then living, yet it was not in her power to do any thing for defendant; ſo that the uncle is treated with as proper to intervene *in loco parentis.* It is true, he is only named as one of two obligees; nor could he be otherwiſe a party. The bond being only executed by the obligor, aſſent of obligee cannot be ſhewn on the inſtrument itſelf: but he muſt be neceſſarily appriſed of it. But from plaintiff's letter to his ſon during the treaty, no one can

can doubt but that he conſidered himſelf as treating with a perſon, who was in ſome ſhape or other to provide for his niece out of his own pocket. It ſhews clearly, the uncle promiſed to do ſomething; and it was the plaintiff's own choice, that this promiſe was not inſerted in the written agreement between the parties; truſting to the honour of the uncle, whom the ſon was to leave to the management of the plaintiff himſelf; and what the uncle did, ſhews the plaintiff acted wiſely in truſting thereto, they living with him until his death, and by his will he gave almoſt every thing to his niece, very amply anſwering the plaintiff's expectations. Though given to her ſeparate uſe, that is notwithſtanding to the benefit of an huſband, leſſening his expence: and by the will the children, had there been any, are ſufficiently provided for. If the uncle had contracted to give ever ſo little, the private agreement could not be ſupported. But ſhall the father avail himſelf of that circumſtance of its being left out of the written agreement, when it was by his own choice? The whole ought then to be conſidered in equity as an open tranſaction between four parties for a treaty of marriage, and a ſecret tranſaction between three of them only in deceit of the fourth. I do not ſee why it is not like the caſe of Sir *Geo. Maxwel, Eq. Ab.* 19. where a marriage agreement was deſigned to be put into writing, as the ſtatute requires, but by fraud of one of the parties it is prevented. The court does not ſuffer the party, who was the occaſion thereof, to come and inſiſt it was void. The court ſays, it was a fraud and owing to him, and he ſhall not claim the benefit of the ſtatute. As I ſee it therefore in this light, (and in that I principally ground myſelf on that laſt letter of the plaintiff), I cannot be juſtified in lending the aid of this court in carrying it into execution. That it was calculated to deceive, is avowed on all ſides: whether the plaintiff was drawn in by the defendant, or not, is not very clear; it rather ſeems he was. One of the parties then to this, which I look on as a fraudulent agreement, cannot be allowed to come here to have it carried into execution for his benefit. Conſequently the bill, ſo far as it ſeeks to eſtabliſh that agreement, or to be relieved againſt the payment of 150*l.* for the time to come, muſt be diſmiſſed. But conſidering the behaviour of the defendant, the propoſer of the fraud, and for want of the merits in the plaintiff's caſe left to reap the benefit of it, (for which I am really ſorry) and conſidering the anſwer ſhe put in, I do not think proper to give her the coſts of the diſmiſſion. The plaintiff is intitled to relief againſt the penalty of the bond; but then muſt pay the arrears in a certain time.

No coſt.

Marquiſs of Anandale *verſus* Marchioneſs of Anandale, *July* 29, 1751.

Caſe 123.

A ſum deviſed to be laid out in lands in England in truſt for A. remainders over, is by act of parliament ſecured on A.'s eſtate in Scotland during his minority. A. attains his age, and becomes lunatick: it may be called in and laid out purſuant to the truſt. It is to be conſidered as an eſtate in England, and a proportion to be ſettled for his maintenance and debts between his eſtates in England and Scotland. Another ſum in the Exchequer in England, ariſing from ſale of heritable juriſdiction in Scotland, conſidered as real eſtate in Scotland.

THIS came on upon the Maſter's report upon an order of reference containing theſe heads; whether it was for the intereſt of Lord *Anandale*, or for the benefit of the truſt eſtate of the teſtator *Vanden Bempde*, or of the perſons who may be intitled to it according to his will, to call in the money placed out on ſecurity of the *Scotch* eſtate of Lord *Anandale* to be inveſted in the purchaſe of lands in *England* according to the truſt, regard being had to the preſent condition of Lord *Anandale*, who had been found a lunatick? The will had directed it to be laid out in purchaſe of lands of inheritance in a particular county of *England*. The Maſter reported, that he conceived, it would be for the benefit of the truſt eſtate, and of the perſons intitled according to the will, ſo to do. X

For Lady Anandale and her children by her ſecond huſband.— Lord *Anandale*'s property and rents and profits of his real eſtate, wherever they lye, muſt neceſſarily follow his perſon for his maintenance, &c. as the court ſhall direct. But however, the principal and intereſt on his ſecurities ought to be conſidered as land and as the profits of land in *England*, and abſolutely under direction of this court, the money being bound by a truſt which this court has decreed to be carried into execution, and placed out in mean time purſuant to ſeveral orders in the names of truſtees, who are to act by direction of this court. The reverſe of this is claimed by Lord *Hoptoun*. It is a queſtion of great value to Lady *Anandale* and her children, who have nothing but what may be the diſtributive ſhare on the chance of Lord *Anandale*'s dying in this ſtate and condition, from which there is no probability of his recovering, and yet in which he may live a long time. The real juſtice as between theſe two funds, his *Engliſh* and *Scotch* eſtate, is, that they ſhould contribute rateably to his maintenance and perſonal debts, which are a lien on no fund. The ſavings, if he dies in this ſtate of mind, will go different ways. By the *Scotch* law the perſonal eſtate will be given only to his nephews and nieces, excluding his mother, &c. which would be very harſh; ſo that the *Engliſh* rule is much more juſt; for otherwiſe all the income of her fortune will go to ſtrangers to them. Both ought to contribute to his maintenance, and the ſavings of each wait the event: not the whole come out of the eſtate in *England* to increaſe the fund, that is to go to his repreſentatives in *Scotland*. He was found lunatick in 1747: yet

X The Maſters report ſtated, "that he had been attended by the counſell & "ſollicitor for the plaintiffs & for the defendant the Marchioneſs of "Annandale & for Rich? Bempde Johnſtone Charles Johnſtone & "Charlotta Henrietta Johnſtone the three infant children of the defendant "the Marchioneſs of Annandale by her ſecond huſband, which ſaid three "children together with the ſaid defendant the Marchioneſs of Annandale "& the Counteſs Dowager of Hopetoun were all the next of kin of the "lunatic & the only perſons who would by the laws of England be intitled to a "diſtributive ſhare of his perſonal eſtate, in caſe he was dead inteſtate. "& by the ſollicitor for the defendant Simon Michell eſquire, & alſo by the "counſel & ſollicitor for the ſaid Counteſs Dowager of Hopetoun, who

in *Scotland* he is a perſon in his own ſenſes: for his ſtewards there under authority from him have gone on above four years, and received the whole profits, accounting to no one: though no doubt it is ſafe: then a proportion of his maintenance and to pay his debts ſhould be contributed according to the value of that fund to this. A lunatick here, reſiding here, having relations here and in *Scotland*, where no commiſſion is taken out, but having money due by his ſtewards acting as if he was of ſound mind, that ought to be applied to his maintenance, ſuppoſing he had nothing elſe to live on. The court can order an action to be brought by the committee for thoſe profits in the proper courts there in name of the lunatick; as was ſolemnly determined in the *Houſe of Lords* in *Morriſon* v. *Morriſon*, *Feb.* 1749, which is very like this; for Mr. *Morriſon* reſided here, where he had relations, as he had alſo in *Scotland*, and 2000 *l.* perſonal eſtate there in hands of a debtor. An action had been brought on it; and it could not be recovered for want of authority to bring the action. On petition to *Your Lordſhip* an action was ordered, and a proxy to appear for him to be executed by the lunatick himſelf. They ſtated in the declaration his being a lunatick and the order to execute this authority; which gave occaſion to the diſpute. The court below allowed the objection to the action. The *Lords* were unanimous, that the order was right, and the action to be maintained. The ſentence was reverſed; and the action went on; and it was held, that if a lunatick reſided in *France*, having an eſtate, debts, and actions here, the courts would not go into the queſtion, that he was a lunatick, to make objections to it, unleſs at the ſame time they ſhewed a grant of the cuſtody. This is that caſe; for if the action is brought, it muſt be recovered, being ſettled by the higheſt authority to be a proper action. In whatever country a lunatick happens to be, the care devolves on that country; and perhaps the profits ought to follow his perſon, which is the caſe here: but we deſire only the ſtrict juſtice, that the two funds ſhould contribute rateably; they now ſtand on very unequal terms; for Lady *Anandale* and her children will not come in for ſavings there, though the other ſide will for ſavings here. As to what is to be eſteemed *Engliſh*, what *Scotch*, eſtate, 36,000 *l.* is by the will to be laid out in purchaſe of lands in *England*, and by act of parliament is ſecured on the *Scotch* eſtate: it is to be looked on as land in *England*, this court conſidering that which ought to be done as done, and purſues that notion through all its conſequences: and this even in the moſt favourable caſe for conſidering it otherwiſe, and for which the court is ſorry, *viz.* againſt creditors. In *Trelawney* v. *Booth*, money borrowed from Mr. *Trelawney* was to be laid out in land, of which the party would be tenant in fee: he died, and his family diſputed

puted it: *Your Lordſhip* determined, that it was land; that it was a ſimple contract-debt; and Mr. *Trelawney* loſt it. Here the court has eſtabliſhed the will, and decreed the truſts to be performed; then it is bound to be conſidered as land in *England*. The laying it out on ſecurities is a temporary cuſtody, until a purchaſe can be made. Then the intereſt of this is profit of land in *England*, under the direction of the court, *viz.* to be laid up for his benefit. It is truſt money; not a debt to Lord *Anandale*, but to his truſtees. The private act of parliament has made no alteration; it was applied for to authoriſe this court to lend out the truſt money on theſe ſecurities during minority, on expreſs recital that the end of the truſt could not then be performed, as no purchaſe then offered: but the act has not determined, that the money cannot be recalled. If this court ordered the truſtees to bring a proper action in *Scotland* to recover this money to be placed out in land in *England*, the courts there could not have interfered in the conſtruction of the will or of the decree, or carried the truſts into execution, which are all under the proper conuſance of this court. They could only judge, whether this money was due on that ſecurity, whether taken on good ſecurity or no and due to the truſtees; and that was all, a court of law could have done here; if it was lent out on legal ſecurity, and the money had not been paid, a court of law could not enter into the truſts. It was only meant, theſe ſecurities ſhould be taken as mortgages here; the truſt is not to be poſtponed for ever; and there are ſeveral circumſtances to induce the court to direct it now. Next as to 3,200 *l.* ariſing from a ſale under the late act of parliament, 20 *G.* 2. of an heritable juriſdiction in *Scotland*, of which Lord *Anandale* was ſeiſed in fee. This, whatever it was originally, is now money, in the *Exchequer* here, and is his perſonal eſtate to all intents: and if he died in the mean time inteſtate, muſt go according to the ſtat. of diſtribution, not by the law of *Scotland*. *Thorne* v. *Watkins*, 30 *Oct.* 1750. Ante. 35.

LORD CHANCELLOR.

It will come to this. Here is, by virtue of an act of parliament, a ſale of a real eſtate in *Scotland*, of one judged a lunatick in *England*, and under cuſtody proper for that here. The queſtion is, whether this court, notwithſtanding it is ſuch a ſale authoriſed by law for publick purpoſes, will not conſider that as if a ſale under direction of the court, as of a ſale of timber growing on the eſtate, not to change the property of thoſe who were to come after; whether it is not part of his real property, and to go in that manner; and whether it will not be ſubject to ſome

ſort of truſt in conſideration of this court? For if the court has directed a ſale of timber on the eſtate, or if a ſale of timber is made by the committee wrongfully, (which was the caſe in *Norfolk*), though the court there could not ſet aſide the ſale, yet directed it to be laid up to be conſidered on the ſame foot of property, as if it had remained timber. The conſequence then will be not to give it to the perſonal repreſentative in *Scotland*, but it concerns the heir at law alone.

For Lady Anandale. But this is a compulſary ſale, and could not be made by any ordinary court. The legiſlature did not conſider the heirs at law as *Chancery* does, which will take care of a mere poſſibility; therefore on a direction to fell timber, it is real eſtate, and will go to the heir, not to executor or next of kin; who will not be put on a better foot, than if the order was not made. This act gives the money in lieu of the hereditament, not conſidering its original nature, unleſs where an intail, ſome caſes being excepted. Where the hereditament was affected with prohibitory, reſolutive, and irritant clauſes, the money was not to be paid immediately, but to be laid out in land to be intailed when purchaſed, or applied in eaſe of debts; but wherever not intailed, the money is to go to the claimant.

E contra. As to the 36,000 *l.* this act of parliament was at the inſtance of Lady *Anandale* and her ſon, and an expedient very beneficial to his eſtate. A ſalutary method during his infancy, which will have the ſame conſequence during his inability. The reaſon given by the act for interpoſing is, that the eſtate was liable to ſeveral adjudications in *Scotland*, if therefore not redeemed, it would be concluſive on the family. It was to prevent a forecloſure, and taking the eſtate at under value; which reaſon holds ſtill. The calling in his money would ruin the *Scotch* eſtate, and open thoſe difficulties. Land in *England* hardly yields more than three *per cent.* eſpecially when the land-tax is high. If Lord *Anandale* ſhould recover (of which there is no impoſſibility) he would not thank the court for doing this. Next the court ſhould not, to deprive the repreſentatives in *Scotland*, iſſue ſuch an order as to the rents and profits. He is not found a lunatick there; and the court there has the abſolute juriſdiction as to thoſe: otherwiſe a different rule as to that part of his eſtate merely from living here. Though it may be true, that the court there cannot judge of the truſt, ſo far as it reſts on the will, yet muſt it look into the act, by which it was to continue thus, while both eſtates remain in the ſame branch: then the court there would have a right to conſider, whether they would permit ſuch a ſuit by the truſtees. The 3,200 *l.* paid in money as the meaſure of

of the value of the hereditary eſtate, and as the government could find nothing elſe to ſubſtitute, is given to him abſolutely, who had the whole property in the juriſdiction; ſo that he can immediately convert it into real eſtate: but this comes to one, who has no will or power to alter it: the court finding that, and it being turned into perſonal by the legiſlature on peculiar motives, ought to put the lunatick's eſtate, as far as it can, in that channel, in which it was before the compulſory ſale.

LORD CHANCELLOR.

This is one of thoſe caſes that ſhews the union of the two kingdoms not yet compleat: and really as the union already made has cauſed a greater intercourſe than when divided, and more frequent marriages and alliances, there happens to be ſuch a communication of rights between the two kingdoms, as makes this ſeparation of the laws and juriſdiction of the courts attended with great inconvenience and difficulty: but we muſt take it as it now is. I concur with the Maſter in the general opinion he has given, that in general it will be for the benefit of the truſt eſtate, and the perſons who may be intitled to the ſame according to the will, to call it in. How that is to be reduced and carried into execution, is of another conſideration. It has been inſiſted on by thoſe, who oppoſe this direction, that it cannot be for their benefit, or if it can, not for Lord *Anandale*'s, becauſe it may tend to bring the ſame miſchief on the eſtate, (which the act intended to preſerve,) that the leaving thoſe ſecurities and adjudications in the hands of the original creditors might have brought, by ſplitting and dividing it for ſatisfaction of thoſe demands: but it is carrying it too far in that extent. Conſider it firſt on the original nature of this truſt, ſuppoſing the money had remained in the hands of the truſtees, and no direction of the court had been given concerning it, and the truſtees had taken upon them without direction of the court, or interpoſition of the act, to have placed this money out on ſecurities of an eſtate in *Scotland*, and particularly Lord *Anandale*'s own eſtate; the truſtees would have acted improperly and without power to do it: and ſtrictly ſpeaking, this court would have gone a great way, notwithſtanding it was in two inſtances done by the court before the making this act. How far the truſt was conſidered there, I know not; but it was done; and it was thought not, properly ſpeaking, in the power of the court to do it, or, if the court could, that it would not prevent the inconveniences, and that produced the act of parliament; but if the truſtees had done it without direction of the court or of the act, they might have made themſelves liable to anſwer to the eſtate for any loſs by breach of the truſt. But undoubtedly notwithſtanding they have placed it out on ſecurity on

Lord *Anandale*'s own eſtate, who was tenant for life of it, the truſtees would have it in their power to have ſued for this by regular proceſs according to the law of *Scotland*, either to have the rents and profits ſo applied, or to have a ſale of the eſtate or part of it, (provided it could be brought within the rule of their law relating to bankrupt eſtates), or to have a decree for *expiry of the legal*, *i. e.* for redeeming the eſtate. They might have taken all theſe remedies; and if they had, or attempted to do it, Lord *Anandale* or any court of juſtice in *Scotland* could not have ſaid, theſe truſtees, who placed out and appeared to be owners of this, ſhould not call it in, becauſe when ſo done Lord *Anandale* would be tenant for life of this eſtate. No court would have ſaid ſo; becauſe not only the intereſt of Lord *Anandale* is to be conſidered, but alſo the truſt of the will, if the court of *Scotland* could have entered into the conſideration of that truſt, which is to lay out this in purchaſe of lands, and that even in a particular county, in *England*, if it could be procured; which may not always be had; and opportunities are to be taken, when it can be had. All the direction in mean time is to place it out on ſecurities. No court then can ſay, that during his life it ſhould remain on ſecurities; for ſeveral perſons are intitled in remainder, and the truſts of the will are to be regarded. Land may riſe; and opportunity of purchaſing when lower ſhould not be loſt. If therefore it had been done by the truſtees or this court without direction of the act, it could not be ſaid, it was not to be called in by reaſonable diſcretion of the truſtees or this court. What then has the act done? it was to preſerve the eſtate, that nothing ſhould be done to call it in during his minority, which is expired. It is plauſible enough, that the ſame reaſon ariſes from his inability by inſanity: but on a very different conſideration. The one may continue his whole life, and that ſeveral years: the other, the legiſlature ſaw would end by computation of time. Perhaps it might bear debate, which would be moſt for his benefit: but the direction to the Maſter is in the disjunctive: then I muſt weigh, which ought to overbalance: and that is, what is for the intereſt of the truſt eſtate. Conſequently I muſt declare, that all proper methods be uſed by the truſtees to call it in, either by aſſignment of theſe ſecurities or by proper remedy at law. *I ſtrictly to papers before me, the Chancellor further directed his to the ſame effect* ~~that the ſame ſhould be done~~ X

The next queſtion, X though not properly within the report, is as to the appointment of money to be raiſed for maintenance of the lunatick and payment of his perſonal debts between the produce of the two eſtates, by reaſon that the perſonal eſtate in *Scotland* at his death will be ſubject to a different rule of diſtribution from the difference between the two laws. I am of opinion, that, as this truſt money is part of the perſonal eſtate of *Vandenbempde*, and to be laid out in land in *England*, it is to be conſidered in this

X "That the principal money placed out upon the ſaid ſecurities & securities being part of the teſtator Vanden Bempde's perſonal eſtate is to be conſidered as part of the real eſtate of the ſ? Marquis of Anandale in England, & that the intereſt ariſing from the ſ? ſecurities is to be conſidered as part of the perſonal eſtate of the ſ? Marquis of Anandale in England." 7th June 1802.

X Note that on this part of the caſe the Lord Chancellor's order is ſtated to me to have been in theſe words. "And a queſtion being moved touching the allowance for the maintenance of the ſaid Marquis from the time of that he was found a lunatic by commiſſion iſſuing out of this court &c. his Lordſhip doth declare, that the burthen ought to be borne & defrayed in a rateable proportion between his real & perſonal eſtate in England & his real & perſonal eſtate in Scotland, regard being had to the reſpective produce of each eſtate: & doth further order, that the ſaid maſter do inquire into & ſtate the proportions to be borne & paid out of & between the ſaid ſeveral eſtates, & that ſuch debts & the expence of ſuch maintenance be borne & paid out of the income & produce of the ſ? reſpective eſtates accordingly". 7th June 1802.

court as an eſtate in *England*; and that the intereſt from thence, though ariſing out of an eſtate in *Scotland* now, yet as it is a mere tranſitory thing, ariſing on changeable ſecurities which may and ought to be called in (and it is directed by the will to go as the profits of the land when purchaſed ought) muſt be conſidered as part of Lord *Anandale*'s perſonal eſtate in *England*, and be ſo applied. Any other perſonal property indeed, that he has in *Scotland*, will be conſidered as perſonal eſtate in *Scotland*. Let the Maſter ſettle the proportion for his maintenance and debts between the two perſonal eſtates in *England* and *Scotland*.

The other part of the queſtion, brought in but incidentally into the report, is as to the 3,200*l.* whether part of his perſonal eſtate at all; next, if it is, whether in *England* or *Scotland*. Now as the money is in *England*, if it comes to the latter, it muſt be as part of his perſonal eſtate in *England*, where it is, and where it muſt be directed to be placed out; and if he died to-morrow, as it is found here, it muſt be ſo. But my doubt is, whether it is not as part of his real eſtate; and if ſo, to be ſure part of his real in *Scotland*; for this act was for publick policy, not meaning to change or alter the rights of any private perſons whatever; for there is an expreſs proviſion made in all caſes, where the party had not the abſolute power over it. This heritable juriſdiction comes not indeed within the firſt proviſion; for it is not pretended, that it was under any ſtrict intail ſo as to prevent Lord *Anandale* from aliening: but it comes within the other deſcription, for this juriſdiction was compriſed in thoſe ſecurities; and then is ſo mortgaged and incumbered, that he could not depart with or ſell. I remember, it was mentioned (though not entered into) in the debate of theſe juriſdictions as an inconvenience, that they were appriſeable by creditors, and therefore they might come into mean hands. If he had been of ſound mind, he could not alien without conſent of the incumbrancers, though he might alien the equity of redemption: but that would not anſwer the purpoſe of the crown. Then there is another clauſe; and taking it on that abſtracted from the former, there is a proviſion relating to lunatick, fatuous, or furious perſons, that their guardian may apply on their behalf, *&c.* which goes farther than the former, providing that in whatever way ſuch perſons are ſeiſed, in fee or in tail, the Court of Seſſion is to proceed in a ſummary way and agreeable to juſtice and nature of the caſe. I ſhould be glad to know, what the Court of Seſſion would have done, if he had been found a furious perſon there. Would that court, on application, have ſaid, that this, though riſing out of his real, ſhould be conſidered as part of his perſonal eſtate, and if he died, to go to his perſonal repreſentative? This occurred at time of making this act; and it was not proper for

the legiſlature to enter into conſideration of ſuch things: they thought proper to leave it to a court of juſtice. A man furious, and therefore incapable, might have debts: if the legiſlature had bound it down, and ſaid, the Court of Seſſion ſhould be obliged to lay that money out in purchaſe of land to the ſame uſes, that might be very inconvenient: for it might be better to lay it out in paying off thoſe debts affecting his eſtate: a man in that condition might have a family and younger children, for whoſe benefit it might be applied: it was left open therefore for the Court of Seſſion to make ſuch order as ſhould be juſt. I am of opinion, that being found lunatick here, and this ariſing out of *Scotland*, in a Court of Equity I ought to follow the ſame rule and make the ſame direction, as the Court of Seſſion would if found furious there: and perhaps the true rule will be to apply this money to diſcharge in part thoſe debts; it ariſing out of this eſtate which is the ſecurity. That is the direction I ſhall give, and think it would be unequitable to ſay, that, when it ariſes out of this eſtate in *Scotland*, it ſhould be conſidered as perſonal eſtate, and that in *England*, becauſe it happens to be in the *Exchequer* in *England*; which would be carrying it too far. It ought therefore to be conſidered as part of his real eſtate in *Scotland*, ſubject to theſe ſecurities and incumbrances, and ſhould be applied in a proper manner to diſcharge of thoſe incumbrances.

Caſe 123. Ex Parte Bax, *July* 30, 1751.

Exceptions to certificate of commiſſioners of bankrupt.

SEVERAL exceptions were taken to certificate of commiſſioners of bankrupt: but it appeared, that the counſel attending there waved all but one, *viz.* that the commiſſioners proceeded *ex parte*, which, it was ſaid, they had no authority to do without ſpecial order of the court. The queſtion now was as to the regularity of the exceptions.

Lord Chancellor.

Courſe of the Court. Their proceedings analogous to taking accounts in equity and on actions. The reaſon why ſo few actions for accounts.

Theſe proceedings under commiſſions of bankruptcy have been formed by way of analogy to the proceedings of the court as a court of equity; and whenever an account is to be taken, the court by its antient conſtitution is to be aided in taking it by ſome proper officer, (as Maſters now are;) becauſe it is impoſſible for the court to take accounts originally; as that would ſo take up the time of the court, that juſtice could not be adminiſtered in other cauſes. And it is analogous to proceedings at law; for in an action at law an account is to be taken by auditors. Indeed when the auditors have taken the account, and on charging and diſcharging the items, iſſues may be joined; and ſo many iſſues then may be tried; actions

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at law therefore for accounts are ſo few, becauſe ſo long time is required. That being the rule of law, and antient conſtitution of the court, the ſame has been followed in proceedings under commiſſions of bankruptcy by referring accounts to be taken by commiſſioners as in cauſes by a Maſter. Sometimes indeed the court refers it to a Maſter, but always to ſome proper officer. In theſe proceedings before a Maſter, the party has liberty to take exceptions to the report: but it is an eſtabliſhed rule, that objections muſt be made before the Maſter as the foundation for thoſe exceptions; otherwiſe the courſe of the court would be quite defeated: as the conſequence would be, that if there were not objections to warrant the exceptions, this court muſt originally take that account, and then the very end and ground of making the reference is thereby defeated. But if on theſe objections ſo taken either the Maſter or the commiſſioners vary the report or certificate, to the matter ſo varied, on which the party has not had a further opportunity of being heard, he may take exceptions not warranted by the objections in ſubſtance the ſame; for then the court will go into it, though not exactly and numerically the ſame. There is no ſuch rule of the court, that commiſſioners may not proceed *ex parte* without order. They as well as the Maſter may do ſo, if the parties will not attend; for the other ſide is not to be thereby delayed or prevented of juſtice. Accordingly the commiſſioners, the proper officers, have done ſo, and certified *ex parte*, and that the objections were waved by the counſel for the objectors; and their certificate is proper evidence of it: nor does it appear, there was any ſaving of right to take exceptions notwithſtanding theſe objections are waved. This is a method to draw in the court to take the account minutely on a reference before themſelves, or occaſion a reference and ſo a further delay.

Exceptions muſt be founded on objections: ſave to the matter varied.

Commiſſioners or Maſter may without order proceed *ex parte*.

Let theſe exceptions therefore be over-ruled.

Harriſon *verſus* Southcote and Moreland, *July* 31, 1751. Caſe 124.

PLEA to the diſcovery and relief prayed, conſiſting of two parts. Firſt as to ſo much of the bill as ſeeks to compel a diſcovery, whether the defendant *Southcote* or his late wife was a papiſt? Secondly as to ſo much as ſeeks to compel *Moreland* to convey an eſtate purchaſed from *Southcote*, and to diſcover any of his title-deeds or writings relating to ſaid eſtate, and to impeach his title.

Plea to diſcovery whether one from whom defendant purchaſed was a papiſt, allowed.

This eſtate was by ſettlement limited to *Southcote* and his wife and the heirs of their two bodies, remainder in fee to the ſurvivor. The wife died without iſſue; and in nine days after her death this

purchaſe was made, and the inheritance of the eſtate immediately conveyed for 4500*l.* of which only 100*l.* was paid by delivery of a bank-note, and the perſonal bond of *Moreland* given for the 4400*l.* to be paid within a year: but the purchaſe-money was afterward reduced to 2400*l.* *Southcote* ſtill continued in poſſeſſion of the greateſt part of the eſtate.

The bill was by *Harriſon* and his wife in her right claiming this eſtate as heir at law to the wife of *Southcote*.

For defendant. The bill is not by a proteſtant next of kin under the ſtatute of diſtribution, but as intitled by deſcent, ſtating a bar againſt which they come to be relieved, *viz.* the ſettlement, charging that both huſband and wife were papiſts at time of the marriage and execution of the conveyance, and conſequently the limitation to him as ſurvivor is void in point of law; and that after death of the wife he, being conſcious that a queſtion might be ſtarted, looked out for a proteſtant to whom to convey it, and that *Moreland* a friend of his agreed to appear a purchaſer; and charging ſeveral things to impeach this conveyance, as the conſideration not being adequate, *&c.* its being done with great precipitation to defeat the heir's claim on the diſability, and without giving opportunity to enter the claim at the quarter ſeſſions. The bill is barely for a diſcovery on the popiſh acts of an incapacity in ſome perſon, under whom *Moreland* derives. If any title at all, it is a mere legal title; for if *Southcote* did not take under that ſettlement, nor the conveyance to *Moreland* prove good, there is a clear title at law, and nothing in plaintiff's way; ſo that they come here on a legal ground ariſing from that incapacity to have a diſcovery of the incapacity. It is now ſettled, that no one ſhall be obliged in this court to diſcover, whether the perſon, under whom he claims, is or was a papiſt. There was originally a diſtinction between the papiſt himſelf being liable to make the diſcovery and a perſon claiming under the papiſt; and there are certainly additional reaſons, why the papiſt himſelf ſhould not make the diſcovery, becauſe that ſubjects him to ſeveral other penalties and diſabilities beſide that, which ariſes in the cauſe: whereas a proteſtant claiming under a papiſt is liable only to that incapacity, which affects his title. But that was very deliberately
3 Bac. 799. conſidered by *Your Lordſhip* in *Smith* v. *Read*, 18 *March* 1736-7. where the bill was to impeach the defendant's title, as the deviſor, under whom he claimed, was a papiſt, and being therefore incapable to take was incapable to deviſe it: the defendant a proteſtant put in a plea ſtating the act of K. *William* and other diſabilities. *Your Lordſhip* taking time to conſider was of opinion, that defendant was not bound to diſcover, whether the perſon, under whom he claimed, was a papiſt; that it was a certain rule, eſtabliſhed on good reaſon, that no one ſhould diſcover, what might ſubject himſelf

ſelf to forfeiture or penalty; that this act was to be conſidered as a penal law depriving the papiſt of the ſame protection of law, he would have, if he was not a papiſt; and that if the bill was againſt the papiſt himſelf, he would not be obliged to diſcover it, though he ſhould be liable to no other penalty than that incapacity. Then there was no difference between that perſon and one claiming under him, ſtanding in his place. In the caſe of forfeiture for waſte a perſon is not obliged to diſcover, yet he himſelf did not commit the waſte. The diſtinction relied on was, that this was not to defeat what veſted, but to ſhew an incapacity for ever to take the thing: but *Your Lordſhip* ſaid, it was not ſo; it was an incapacity inflicted by the legiſlature; that the caſe of a baſtard or alien, which was argued from, was on different grounds; for that incapacity ariſes from the general rule of law, to which all the King's ſubjects are liable; ſo in caſe of bankrupts; theſe not being conſidered as penal but remedial; ſo of fraud attended with forfeiture; and ſo of civil rights; and there never was a caſe ſince that act, where one was forced to diſcover, whether the perſon, under whom he claimed, was a papiſt or not: therefore *Your Lordſhip* allowed that plea. This authority is taken notice of ſince in *Jones* v. *Meredith*, *Comyns* 661. There can be no diſtinction between the preſent caſe and that, the flaw in defendant's title ariſing by reaſon of the incapacity of the perſon from whom he claims. There a voluntier was not obliged to diſcover; *a fortiori* a purchaſer for valuable conſideration ſhould not. If defendant diſcovers it, it defeats his eſtate by reaſon of that law, which muſt be penal. Like the caſe of waſte by the anceſtor, under whom the party claims; an act by which the title is loſt; he is not obliged therefore in this court to diſcover that, which occaſions a forfeiture on foundation of miſbehaviour or a crime, or being in ſuch a ſituation the law does not approve, and in conſequence of which that diſability incurs. If therefore they can make out the fact, they muſt do it by evidence. As there was at that time no caſe in which a perſon was obliged to anſwer, whether the perſon, under whom he claimed, was a papiſt, there has been none ſince. There are ſeveral caſes where advantage has been taken of theſe popiſh acts, as in *Ireland*; wherever the legiſlature means there, that a perſon ſhall diſcover, there is a particular clauſe for it; of which they have many caſes: but there are always particular clauſes. So in many caſes here, as in the late gaming law, and of perſons trading, in caſe of the *Eaſt India Company*; which acts ſhew, that without a particular clauſe for it a court of equity will not compel thereto.

LORD CHANCELLOR.

Part of this bill is on a ſuggeſtion of facts tending to diſcover, whether this is not a truſt; the queſtion therefore will be, ſuppoſing

ſing you prevail on the firſt point, whether yet the plea does not go too far in covering other matters, *i. e*, whether this is not a truſt for *Southcote* himſelf and colourable?

For defendant. As the plea may be divided, and be good in part and bad in part, it is of no conſequence. It is averred poſitively, that there is no truſt whatever, and that it is a *bona fide* purchaſe: and ſuppoſing this plea to be all true (as it muſt be taken *pro hac vice*) it is a bar to that relief prayed. This will depend on the conſtruction of 3 *G.* 1. which is a material act to many proteſtant purchaſers. The policy of the act of K. *William* was to prevent papiſts having their fortune in land, to induce them by the difficulties laid on them to ſell thoſe eſtates, and prevent their purchaſing others and laying out money in that ſort of property; for it was thought then, that the credit and influence, land-property gave, was greater than that of money; and to a certain degree it is ſo. This invited them to ſell and change the nature of their property. If then a proteſtant purchaſer could not be ſafe in his purchaſe, the view of the act would be defeated. The exceptions in the act are out of the caſe; for it is averred by the plea, that plaintiff had not recovered, nor given notice of his claim, before bringing the bill, nor entered his claim at the quarter ſeſſions; and this conveyance is inrolled. The requiring the particular ſolemnity of ſix months ſhews, the legiſlature requires the purchaſer to know, that a papiſt is ſelling; and clearly meant to encourage him to ſell as faſt, as he could, leſt the next heir ſhould claim, and to make the proteſtant ſafe in buying; ſo that, unleſs any of thoſe exceptions happen, a ſale to a proteſtant ſhall bar. Admitting *Moreland* knew him to be a papiſt, and that *Southcote* himſelf knew, the objection could from theſe acts be made to his title, and therefore determined to ſell, and that expeditiouſly: the ſingle queſtion then is, whether this is a purchaſe *bona fide* and merely for benefit of the proteſtant purchaſer, as ſworn and averred by the plea and anſwer? The exact value is not material; for the act does not ſay *to the full value*, but *full and valuable conſideration*; and on that it will not be ſet aſide, merely becauſe another would give one year's purchaſe more; as *Your Lordſhip* held in *Wildgooſe* v. *Moor*, and that as to the conſideration it was only one evidence of the reality of the purchaſe. If a truſt can be proved, it falſifies the plea; but it now muſt be taken for truth. The vendor's continuing in poſſeſſion was under a leaſe by the purchaſer. Suppoſing *Moreland* had a good bargain, if a purchaſe for his own benefit, that will not impeach it. Whenever a papiſt ſells without waiting the market, he ſells at a loſs; that is an argument of the fairneſs: the reducing the purchaſe-money 1000*l.* ſtrengthens the credit and reality of the purchaſe. If an inquiry is to be made, whether it was worth a year's or half a year's purchaſe more, it will overturn the act. The value of land

has riſen, as that of money decreaſes: but that will not defeat the title of a proteſtant purchaſer merely for his own benefit.

For plaintiffs. There is a diſtinction between this caſe and *Smith* v. *Read*; for as defendant there claimed only by voluntary deviſe, if compelled to diſcover that deviſor was a papiſt, it would undoubtedly defeat his title: but defendant here has not pleaded himſelf deviſee or voluntary grantee, but purchaſer for valuable conſideration, from a papiſt; and has made all the averments neceſſary to bring himſelf within the protection of 3 *G.* 1. therefore is ſafe, let him diſcover what he will. The firſt part of the plea that the diſcovery would be fatal, is inconſiſtent with the latter, in which he inſiſts on being within the protection of the act. The tranſaction is under ſuſpicion, and muſt be a truſt from the circumſtances. *Moreland* lived at 100 miles diſtance, yet the conveyance was made in nine days; in which time *Southcote* neither was, or could be, reputed owner, nor in perception of the rents. A full conſideration was not paid; nor is the reſidue of the purchaſe-money yet paid; and if vendor cannot come at it, vendee is conſidered as truſtee for him, and the real intereſt remains in him until payment.

LORD CHANCELLOR.

Though in general it is ſo, where vendor labours not under any incapacity: it is not in this caſe, for that would be giving an intereſt in land to a papiſt.

For plaintiffs. Where an eſtate deviſed is to be ſold, the reſidue to a papiſt, that is void, becauſe under appearance of continuing the ſale he may evade the act. Here *Southcote* continues in poſſeſſion under the leaſe: if this plea is allowed a bar, a papiſt may in any caſe protect his right to the eſtate.

LORD CHANCELLOR.

The general rule is, that penal laws are not to be taken or conſtrued by equity; and therefore no over rigorous or ſtrained conſtruction is to be made in any court of juſtice, much leſs of equity: but notwithſtanding that, I am very apprehenſive, if I ſhould allow this plea generally, as inſiſted upon, I ſhould lay down ſuch a rule for conveying eſtates in the hands of papiſts, as would tend entirely to overturn and defeat the operation and effect of this act in caſes, in which it ought and was deſigned by the legiſlature to have its operation and effect: for the conſequence would be, that ſuch ſort of ſales or contracts for ſales, attended with a conveyance as this is, may be made: the real agreement ſhall be, if there is no litigation

concerning this in a reaſonable time, it ſhall be a truſt for the papiſt; if it comes to be controverted on ejectment or bill brought by the proteſtant heir, then it is a good Sale. This would be the method, if allowed generally; yet the court muſt not make ſuch a determination, as will break in on former, or on that general rule eſtabliſhed with great juſtice and tenderneſs in the law of *England*, that none ſhall be obliged to diſcover, what may tend to ſubject him to a penalty, or that which is in nature of a penalty. Hardly a caſe can come before the court under ſtronger circumſtances of ſuſpicion of a colourable tranſaction than this. I agree, it is not ſufficient to over-rule the oath of the defendant poſitively ſworn in his anſwer, which I muſt take to be true: but it would go to require very ſtrong proof: not that I am now arguing the merits of the caſe. In nine days after death of the wife (in which time it is very difficult to acquire a reputed ownerſhip) is this purchaſe pretended to be made from *Southcote*, whom, as it is not anſwered, I muſt preſume to be a papiſt; made without any knowledge or previous treaty concerning it; taking a mere bond for all this conſideration-money except 100*l.* without ſecurity, other than what may be ſuppoſed to ariſe from a lien in a court of equity. No man in his ſenſes ever ſo tranſacted, unleſs ſomething was intended to be covered by it: nor has any thing more the appearance of being colourable than his continuing in poſſeſſion under a leaſe by the purchaſer. The reducing the purchaſe money afterward is ſaid to give credit and reality to the purchaſe; but I do not take it to be ſo. It ſhews, they lumped it in an extraordinary manner; finding the conſideration-money to be greatly above the value of the eſtate, which would have been an imputation upon the reality of the purchaſe, they reduced it afterward to give a better appearance; which induces great ſuſpicion. It comes on a plea, which muſt be taken to be true, as ſtated: but it is not a plea of purchaſe for valuable conſideration without notice, though it is to the diſcovery and relief both: and if it had been ſo pleaded, and notice denied, it would not be ſufficient in this caſe: becauſe, as it is not pretended, that more than 100*l.* in part was paid, that takes it out of the rule of plea of purchaſe for valuable conſideration without notice; for if you have not parted with your money, you are intitled to relief againſt any ſecurity, you give.

As to the firſt part of the plea, of the act 11 & 12 K. *Will.* and 3 *G.* 1. that of K. *Will.* brings a diſability on papiſts, and conſequently affects all claiming voluntarily under them or by conveyance not protected under *Stat. G.* 1. The defendant is delivered from one part of the danger, which may ariſe from diſcovery of that fact, as it is not pretended, he is a papiſt himſelf, therefore no perſonal diſability can fall on him: but the penalty ſuggeſted is, that if obliged to diſcover, that the perſon, from whom he purchaſed, was

was a papiſt, it would tend to defeat his title to the eſtate as a purchaſer, and as having a title to it; whether his purchaſe-money was all paid or not is not material to that part of the caſe, as he has given a ſecurity for the reſt. In general that point is eſtabliſhed, at leaſt as to my opinion, by the determination in *Smith* v. *Read*; which was without any long time taken for conſideration. So far that is a judgment by me, and, as no ground to vary my opinion, muſt bind myſelf, that where there is a plea of a title derived voluntarily from a papiſt or by voluntary conveyance, not ſuggeſted to be a colourable truſt for benefit of that papiſt, in that caſe, by reaſon of the penalty which would ariſe from ſuch diſcovery of the incapacity of the deviſor or grantor; he ſhall not be obliged thereto; and this caſe appears in *Jones* v. *Meredith* to be allowed. There is indeed ſuch a diſtinction, as has been argued, which makes this caſe not ſo ſtrong as that; but not ſuch a diſtinction as will finally prevail and oblige defendant to the diſcovery; for certainly a purchaſer is not to be hurt by diſcovery of a matter, that will tend to forfeiture of his eſtate or be a loſs in conſequence of a penal law; and he may plead or anſwer ſo as to ſhew a caſe within the protection of this act or any other law; and he pleads according to his knowledge. Several things are neceſſary, which he has averred here; as no recovery before his purchaſe; no notice of plaintiff's claim, nor entry thereof in quarter ſeſſions. All this he has averred, as every one muſt, according to the beſt of his knowledge or information. Yet part of this may be diſproved at hearing the cauſe, and if he ſhould fail in any one of theſe circumſtances, (which a man may very innocently do) and has made the diſcovery, there is an end of his conveyance; that diſcovery binds him, and is the loſs of his eſtate out of the power of this court; and this notwithſtanding he had paid his whole money. It is ſo as to his 100*l.* This court could not help him, or make that 100*l.* a charge on the eſtate againſt the plaintiff. When once he has made the diſcovery, the law makes void the conveyance, and there may be a recovery by ejectment at law without coming here. As therefore it is ſettled in *Smith* v. *Read*, it is a conſequence from thence, that he ſhall not be compelled thereto, for it may overturn his purchaſe; which is ſufficient to bring him within the protection of that rule. It might be very dangerous to fair purchaſers, who had paid their money, if obliged to diſcover whether vendor was a papiſt or not, leaving it open to ſeveral doubtful circumſtances. Conſequently the plea of 11 & 12 *Will.* 3. to diſcovery, whether *Southcote* or his wife was a papiſt or profeſſed the popiſh religion, ought to be allowed.

But as to the other part of the plea a different kind of queſtion ariſes; and no ground to allow it either as to the diſcovery or relief. Firſt in reſpect of the diſcovery: the defendant has not indeed

pleaded to the diſcovery of his own purchaſe deeds; nor can any purchaſer do ſo, for he muſt ſet them out in order for his own title. But on what foundation does he plead this? It impeaches the very ſettlement; for this heir at law is intitled to know, what that ſettlement was, and by what means and manner he is diſinherited thereby: and yet this plea goes to the diſcovery of his title-deeds. There is no ground for that, eſpecially as he has not pleaded himſelf a purchaſer for valuable conſideration without notice; and if he had, all but 100*l.* part of his purchaſe-money is in his own pocket. Then as to what he ſeeks to impeach the title, it is a very general plea, *viz.* to all the further diſcovery and all the relief prayed by the bill. Now notwithſtanding the defendant's ſtrong averments in his plea as to the denial of this being colourable, and averring that it is for his own benefit, the plaintiff is intitled to ſift him by exceptions, if there is ground for it, to know all the circumſtances of this tranſaction, which would be all covered, if the plea was allowed as to that; for the plaintiff then cannot except to his anſwer, but muſt be bound by this general anſwer. Next as to the relief, it would bar the heir at law of every thing; for though the heir at law is not intitled to come into this court by ejectment-bill to have a decree and account of rents and profits, he is in a certain degree intitled; as if there are any old ſatisfied terms on the eſtate, he is intitled to bring his cauſe to be heard, and have them ſet out of the way, that he may try his title at law on the clear right: but ſuppoſing nothing of that, there is a certain degree of relief, the heir at law has, which is peculiar to this, to have an order for the inſpection of all deeds and writings relating to this eſtate, to ſee whether he is diſinherited and by what means. If this plea is allowed, and plaintiff ſhould come without at all inſiſting on the papers, and pray it, he will be told, he comes too late for that, and cannot have it; and I think, he would be ſo.

The plea therefore as to all the other parts, except as before mentioned, ought to be over-ruled: then no coſts can be on either ſide. But the beſt way is, that as to all the other matters they ſhould ſtand for an anſwer until the hearing the cauſe.

Caſe 125. Lord Montague *verſus* Dudman, *July* 31, 1751.

Demurrer to injunction to *mandamus* allowed: ſo to indictment, information or prohibition.

DEMURRER to a bill charging that plaintiff as lord of the borough of *Midhurſt* was intitled to a valuable heriot on the death of any tenant within the borough; and that ſeveral conveyances were made to defendants in truſt, to defraud the lord thereof, whereas no perſon in truſt for others are intitled to thoſe conveyances, praying therefore a diſcovery of thoſe deeds, and an injunction or order in nature of injunction to ſtay proceedings on a *mandamus*

mandamus iſſued to compel the plaintiff to hold a court and admit defendants as tenants.

LORD CHANCELLOR.

How can I grant an injunction to a writ of *mandamus*, and that to a *mandamus* at common law, not within ſtatute 9 Queen *Anne*? though I do not know, I would in that caſe.

For plaintiff, There is a very general demurrer both to diſcovery and relief. There are charges in the bill to ſupport the ground of equity, ſuggeſting facts done by defendants to deprive the plaintiff of the benefit of his ſervices or tenure. It is a fraud, if the real owners, who were to pay the ſervices to the Lord, ſhould convey to inſolvent perſons. If a leſſee aſſigns to a beggar, this court has interpoſed, though circumſtances may rebut the equity. Bills are often brought by Lords for diſcovery of goods and chattels of his tenant and ſatisfaction of his heriot. Heriots are protected by ſtatute 13 *Eliz.* Actions of debt have been brought to recover againſt fraudulent gifts. 2 *Leon.* 8, gift to defraud a Lord is void. Defendants ought to diſcover, whether theſe deeds are really executed or not; for if not, the Lord is not bound to admit. This is a queſtion of private property affecting the Lord. A bill may be brought to know the reality of a bond, upon which an action is brought. Next no perſon ought to be admitted in truſt for another. Theſe are material facts on the face of the bill, of which plaintiff wants a diſcovery; and whether to defend againſt a *mandamus* in a matter of mere private property, or againſt an action at law, it is a foundation for a bill and aſſiſtance of this court, whether it is a right in equity or at law. Then the remedy taken at law will not prevent interpoſition of the court, though they proceed by *mandamus* nominally at ſuit of the crown. Though this is a *mandamus* at common law, it is only to try a private right. 1 *Wil.* 349. is very ſtrong for the interpoſition of this court; and *Mo.* 820. even in caſe of indictments an injunction has been granted. In *The Mayor of York* v. *Pilkington*, a right to fiſh in a river being controverted, ſeveral perſons, indicted by the corporation, applied for injunction: *your Lordſhip* held, you could not grant an injunction, as you would, if action of *treſpaſs* had been brought: yet granted an order to ſtay the proceedings; which is the ſame, as is prayed here whether by injunction or order.

LORD CHANCELLOR.

If I ſhould over-rule this demurrer, I ſhould open a new door of juriſdiction to this court, which, I believe, would afford a ſcene of very great inconvenience and miſchief, and bring all the corporation and borough-cauſes in this kingdom in ſome ſhape or other on the foot of diſcovery or relief. This court has no juriſdiction to grant an injunction to ſtay proceedings on a *mandamus*; nor to an indictment; nor to an information; nor to a writ of prohibition, that I know of. The reaſon is, that a *mandamus* is not a writ remedial, but mandatory. It is veſted in the king's ſuperior court of common law to compel inferior courts to do ſomething relative to the publick. That court has a great latitude and diſcretion in caſes of that kind; can judge on all the circumſtances; and is not bound by ſuch ſtrict rules as in caſe of private rights. That therefore muſt be given up, as no colour for ſuch injunction. As to the caſes cited, 1 *Wil.* 349, is quite of a different kind: that did not come into this court on the foot of an equitable juriſdiction at all; but the conſideration was, whether the court ſhould inforce that return or not. A writ of error will lye on a proceeding on the ſtatute 9 Queen *Anne*, where they can traverſe: and yet there is no *ſuperſedeas* to the writ of *mandamus*: but in that caſe it was a ſort of compromiſe, and on that the court proceeded, and therefore gave the time deſired: but there is no determination that this court would interpoſe on that. As to the old caſe in *Mo.* I cannot go ſo far by any means. If indeed that came to be mixed with civil proceedings in this court relating to the title of the eſtate, that would be a very different conſideration. As to *The Mayor of York* v. *Pilkington* the court granted an order to ſtay proceedings, becauſe the queſtion of right was depending in this court in order to determine the right; and therefore it was reaſonable, they ſhould not proceed by action or indictment till it was determined here: and there it came in incidentally. All then, that remains, is the diſcovery, which is ſought in aid of the defence. A bill of diſcovery lies here in aid of ſome proceedings in this court in order to deliver the party from the neceſſity of procuring evidence, or to aid the proceeding in ſome ſuit relating to a civil right in a court of common law, as an action: but not to aid the proſecution of an indictment or information, or to aid the defence to it. It is ſaid, this is a *mandamus* to compel the holding a court: but this court has nothing to do to aid the diſcovery upon that. This is a borough; and the queſtion is plainly relating to the rights of voting therein as a *burgage* tenure. Then it is ſaid, they conveyed their eſtates to thoſe perſons as truſtees for them, and conſequently have put them into the hands of people

Mandamus not a writ remedial. B. R. has great latitude therein.

Where the right depending here, order not to proceed by action or indictment.

Bill of diſcovery lies to aid proceedings here or at law as to a civil right, not indictment or information; nor by a Lord for diſcovery whether this or that perſon ſo capable to anſwer an heriot.

people not able to pay the duty to the Lord on death of the tenant. If I ſhould lay it down as a rule, that a Lord of a manor can come into this court, whenever any one comes to be admitted, by bringing a bill to diſcover whether that perſon is a truſtee for another, and whether he is ſo capable to anſwer a good heriot to the Lord, as another perſon might be, that would occaſion infinite confuſion. If this court was to entertain bills of diſcovery, whether this or that perſon was of the beſt ability to anſwer the heriot, it would lay ſuch difficulties on copyhold eſtates, there would be no end of it; for this concerns copyhold eſtates. And though this concerns a farther queſtion relating to the right of voting in this borough, that is a farther reaſon againſt it; as it tends to lay a reſtriction upon that right. I will go by *Littleton*'s rule, that it is a good argument, an action lies not, becauſe one was never brought. I never knew a bill of this kind, and therefore will not make the precedent. Let this demurrer be allowed.

Beard *verſus* Earl of Powis, *Auguſt* 1751. Caſe 126.

THIS cauſe abated by the marriage of *Miſs Herbert*, one of the co-plaintiff's with the defendant, and was not revived.

Where a cauſe abated, money may be ordered to be paid out of court without revivor upon conſent: but not without all parties intereſted.

Petition, conſented to by the plaintiffs, that the executors might raiſe money by ſale or mortgage of a term, and pay it to defendant, with a view to putting an end to the ſuit.

LORD CHANCELLOR.

By conſent of parties I may indeed order money to be paid out of court without revivor of the ſuit, where it has abated. I may go ſo far as to declare, that the defendant is intitled to ſo much: but the queſtion is, how much I can go farther as to the prayer of this petition? I can make an order in nature of a decree on motion or petition, provided it is conſented to by all the parties intereſted: but here are not parties to conſent: for as to the raiſing money out of the eſtate it concerns the eſtate and thoſe intereſted in remainder, it being limited to the defendant for life, remainder to firſt, *&c.* ſon in tail, remainder in fee to his wife, who is an infant and a plaintiff, ſo that ſhe and her heirs will be concerned. How then can I make a decree on motion for ſale or mortgage of a term, which muſt be a charge on the eſtate or inheritance of an infant? I can do it by decree on the hearing; but not by order on conſent of theſe parties: and though there is a private act of parliament, I cannot carry that into execution

by order on petition, any more than I can the truſts of a deed. The act of parliament could not give me a better juriſdiction, than I otherwiſe ſhould have. If *Lady Powis* was of age, that might be another conſideration, and make it ſtronger: though there the contingent remainder might ſtand in the way; but here is that further objection, nor can I order the parties to be paid the coſts of ſuit. Here are not parties to conſent to make the decree on petition compleatly; I can only declare, that on the plaintiffs affirming their conſent to the prayer of the petition I will not reſtrain the truſtees from raiſing and paying it to the defendant.

Caſe 127. Welford *verſus* Liddel, *Auguſt* 3, 1751.

BILL for an account of the eſtate of plaintiff's father.

Plea of ſtatute of limitations.

Plea of the ſtatute of limitations, not to the general account prayed, but to an account concerning the tranſactions between plaintiff and his father in his life, averring that if plaintiff had any cauſe of action againſt his father, it accrued ſix years before ſervice of proceſs to anſwer the bill.

LORD CHANCELLOR.

The exception therein as to merchants accounts was to prevent dividing the account where running, and part within the time, part before.

A plea of the ſtatute of limitations covers the diſcovery always. It is a pretty difficult conſtruction how to apply that exception in the ſtatute relating to merchants accounts. It is not, that defendant may not plead the ſtatute in all caſes, where the account is cloſed and concluded between the parties, and the dealing and tranſaction over. It was not the meaning to hinder that; but it was to prevent dividing the account between merchants, where it was a running account, when perhaps part might have begun long before and the account never ſettled, and perhaps there might have been dealing and tranſactions within the time of the ſtatute. But that is not the caſe here.

Caſe 128. Griffith *verſus* Griffith, *Auguſt* 5, 1751.

PETITION to remove a receiver; the two ſureties joining in the petition.

LORD

LORD CHANCELLOR.

That varies not the caſe; for if people voluntarily make themſelves bail or ſureties for another, they know the terms; and will be held very hard to their recogniſance, and not diſcharged at their requeſt to have new ſureties appointed; for then there would be no end of it. It does not appear, he could get better ſureties. No regard therefore is due to their application; unleſs for benefit of the parties in the cauſe, or ſomething of that kind.

Sureties for receiver not diſcharged at their requeſt.

One charge of miſbehaviour on this receiver was his letting the owner of the eſtate continue in poſſeſſion of part, by whoſe going beyond ſea a loſs was likely to happen to the eſtate.

LORD CHANCELLOR.

The courſe of the court is, that if a receiver is appointed, and the owner of the eſtate is in poſſeſſion of part of the premiſes, application ſhould be made to the court, that the owner ſhould deliver poſſeſſion to the receiver; who cannot diſtrain on the owner in poſſeſſion, as he is not tenant to him. If therefore a loſs ariſes, it was the parties fault in not applying for that.

Application ſhould be made, that owner ſhould deliver poſſeſſion to receiver, who cannot diſtrain.

Ex Parte Southcot, *Auguſt* 6, 1751. Caſe 129.

PETITION for commiſſion of Lunacy againſt *Thomas Southcot*, who was poſitively ſworn to be a lunatick, ſtill continuing ſo, now at *St. Venant in French Flanders*; to which place he was in the life of his father *Sir Edward Southcot* removed from *Ghent*, as not properly taken care of there.

Lunacy. Commiſſion iſſued to inquire of the lunacy of one beyond ſea, directed where the manſion and great part of the eſtate lay.

Argued, that the court is not now to determine, whether he is a lunatick or not; for that will be ſtill before the commiſſioners. Upon the affidavits there is ſufficient ground of probability to iſſue that commiſſion; but then the difficulty is, whether a ſubject, who is abroad, can have a commiſſion iſſue againſt him in *England*, which inquiry will intitle the crown to thoſe lands and tenements, he is deſcribed ſeiſed of in *England*. It is difficult to prove the lunacy of one, who cannot be brought before a jury for inſpection, if the commiſſion is oppoſed and the leaſt contrariety of evidence. Next it is difficult to get rid of ſuch an inquiſition by ſetting it aſide; for he muſt appear in perſon to traverſe it. In *F. N. B.* where one is found lunatick, which is

returned into *Chancery*, he is not concluded by it; for he may come in perſon, &c. In *Roberts*'s caſe 1743 it is a traverſe in perſon; ſo in *Stone*'s caſe in *Tremain*. This ſhews the difficulties in taking out commiſſions in theſe caſes, and the reaſon they are ſo rare. In the preſent caſe it is impoſſible to bring him over without endangering his health. This is of great conſequence; as ſeveral ſubjects of this kingdom live abroad, and though in other parts ſubject to the king of *England* they will be all ſubject to the ſame queſtion. In the *Plantations* indeed the governors will have a power to take care of the perſon and eſtate there by virtue of the king's commiſſion appointing them governors: but no farther. They cannot take care of a lunatick's eſtate in *England* for to that there muſt be a commiſſion under the great ſeal of *England* appointing a committee of the eſtate. The ground of the crown's granting a commiſſion of lunacy or idiotcy is not by the ſtatute *de Prerog. Regis*, but by the common law: and yet that ſtatute has been held to extend thereto. The crown by the general law of the land is to protect the perſon and eſtate of the ſubject, wherever the perſon himſelf cannot; which is the caſe of infants, and of eſtates derelict: though they come to the crown in their own right as *Eſcheats*. *F. N. B.* lays it down, that the king is to defend all his ſubjects if not capable of defending or governing themſelves, or ordering their rights, goods, and chattels; which is from the neceſſity, extending to the perſon and the property; and the only way to do it is preſcribed by the law by commiſſion of inquiry firſt to aſcertain that he is a lunatick, after which being found it is immaterial to the care of the eſtate, whether he is or is not in the kingdom: though the common caſes are, where both the property and the perſon are under care of the crown, they are not ſo dependent, as that the crown cannot grant one without the other. It is often done; as where a receiver is appointed. The law gives this inquiry with two diſtinct views; for ſake of the lunatick or idiot himſelf, and for ſake of the crown's right. The firſt is, that the party may not do himſelf a miſchief, may be taken proper care of, and put into proper hands; which inquiſition, when the perſon is beyond ſea, would be fruitleſs, as it could not have effect: but in the other view it is abſolutlely neceſſary to have ſuch inquiry relating to the prerogative of the crown as to theſe lands in *England*: of which right by the common law, and declared by the ſtatute *de prerog. regis*, the crown cannot be deprived by the perſon's being beyond ſea. In the caſe of Lord *Wenman* an idiot, a queſtion was ſtrongly litigated; and if they thought, that carrying him beyond ſea would do, they would have done it: this is the caſe of a lunatick. The whole management of his eſtate in mean time is in the crown, though ſubject to account on his recovery except as to what cannot be accounted for;

1 Wil. 701.

which is the real intereſt and benefit of the crown; as a preſentation to an advowſon on a vacancy during the lunacy. If a common Lord of a manor has a right to the cuſtody of eſtates of lunaticks or idiots, their ſecreting themſelves would not deprive thereof, becauſe it is in right of his tenure. In *F. N. B.* there is a particular writ of *livery* to the heir of an idiot, who held in *capite*: nor is there any thing from the nature of the commiſſion or practice to infer, that an inquiſition cannot be iſſued, where the perſon cannot be inſpected. There are two forms of theſe writs: the firſt to the eſcheator; the principal point of which is to take care of the perſon; and therefore is the eſcheator required to go in perſon and examine, but there is no production to the Jury required: the other is to the Sheriff, which is with a view principally to the right of the crown; and therefore he is not required to go in perſon, as the eſcheator is. The firſt form of writs has not iſſued for a long time; but the commiſſions, which iſſue now, are formed according to the laſt ſet of writs, which do not require the going in perſon; though that is frequently ſupplied by a collateral order to be produced before the jury: but that is different from the commiſſion. There have been ſeveral verdicts without his being produced or ſeen, for though the whole effect cannot be had as to his perſon, yet as to his eſtate, which will be taken care of, it may. *Beverley's* caſe 4 *Co.* makes uſe of an argument from the form of the writ, which may be uſed now; *viz.* that a man cannot be examined after his death: but he ſeems miſtaken as to the reaſon, he gives, why a commiſſion cannot be taken out after his death: for the plain and better reaſon is, that then that care veſted in the crown cannot be made uſe of, ſo that the end cannot be anſwered. There is no negative authority, that where a perſon is beyond ſea ſuch a commiſſion cannot be had; and it would be attended with great difficulty; as in the caſe of a ſon of a natural born ſubject, born beyond ſea, who (by 7 *Anne* is ſtill a ſubject of the crown) never was in *England*, and becomes lunatick. In the late caſe of Sir *Butler Wentworth*, though a fine or recovery cannot be ſet aſide on ſuggeſtion of lunacy, yet it is held in *C. B.* that the deed making him tenant to the *Præcipe* was void, and conſequently his eſtate deſcended to his heir notwithſtanding the uſes of that recovery.† But there is a caſe in point of *Thomas Richard Halſe* an infant, 30th *November* 1743; where application was made by *Francis Sadler*, intitled to the reverſion of an eſtate of 1500*l. per ann.* in *Jamaica* after death of this infant, who was ſaid to be a lunatick, and reſided with his mother in *Hertfordſhire*. A commiſſion was directed to inquire into the lunacy; and *Sadler* obtained an order from the court, that whoever had the infant, ſhould produce him at the execution of the commiſſion to be inſpected and examined. The commiſſioners met; a jury-

Lee 12. Co. 123.

† In the case here mentioned, Mr. Bright Holmley first brot. his bill in chancery to set aside the recovery on the ground of ideotcy; & lord Hardwicke having by his decree retained the bill for a year, in order to give an opportunity of trying the question at Law, Mr. Holmley brought an ejectment, & recovered in consequence of proving Sir Butler Wentworth's want of sufficient understanding at the time of executing the deeds for making a tenant to the præcipe. The decree in chancery was made the 2d. of July 1744; & it appears by it, that the lease & release for making a tenant to the præcipe were dated 24. & 25. May 1736, that Sir B. W. appeared as vouchee by attorney,

jury was ſummoned, and proceeded, though the infant did not appear according to the order, the mother ſecreting him. The verdict found, that he was not a lunatick, but judged him not proper to take care of his affairs during his fits. *Your Lordſhip* thought the verdict repugnant, and ordered the commiſſion into *Hertfordſhire* to be ſuperſeded, and a new commiſſion into *Middleſex*, where he was laſt though but for a very ſhort time, and that whoever had the infant, ſhould produce him. On affidavits that the mother went over to *Antwerp* to prevent this, the commiſſion was executed, and the jury found him to be a perſon of unſound mind and not ſufficient to govern himſelf, and the cuſtody of his eſtate was granted to *Sadler*, and that in general terms, though it appeared, that cuſtody could not operate unleſs in *Jamaica*: which goes a great way, determining ſo far that though not in *England*, yet might a commiſſion go to inquire of the lunacy; and this though there was a guardian appointed, who was accountable; for he was alſo an infant. A ſubject cannot transfer his allegiance; the crown has a right to its ſubject, wherever he is; can ſend for him over; and then the committee of the crown may take his perſon. That is the proper method by giving authority in an amicable way to bring the perſon over, though it cannot be done by force. So the court has granted the guardianſhip of an infant though beyond ſea. Another difficulty mentioned is, that the jury muſt be ſummoned by the ſheriff of the county, in which the perſon reſides; which is from the conveniency of the neighbourhood: but it may be directed to the ſheriff of any particular county, where the perſon laſt reſided, or to the next county to the place where he reſides, as has often been done in caſes at common law.

LORD CHANCELLOR.

This comes before me on very particular circumſtances, ſuch as create doubts, how far I can conſiſtently with the rules of law and proceedings in this court interpoſe. I had two doubts; firſt as to the fact whether it ſufficiently appeared by affidavits before me, that the perſon, againſt whom the commiſſion prayed, was a lunatick, or that the evidence was applicable as to the perſon: for as it then ſtood, it appeared only, that two perſons had been ſent over, who never ſaw *Thomas Southcot* before, had gone to *St. Venant*, where a perſon was produced to them as ſuch, of whom they could know nothing but by relation. But conſidering what I am to do in the preſent inſtance, being only to judge whether it is proper to put this into a method of inquiry, and not concluſive that the perſon, againſt whom it is granted, is a lunatick, that is ſufficiently ſupplied by further affidavit, which brings it

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up to the circumſtances ſworn in the other affidavits, and applies them to the perſon of *Thomas Southcot*. If a perſon had been ſent over, who had ſeen him in *England*, and could ſwear to the identity, ſuch evidence, if it can be had, would be very material to lay before the Jury and Commiſſioners: but they are judges of that. As it is before me, there is ſufficient probable evidence, for this, provided I am warranted by law to do it: which brings it to the queſtion of law; as to which I doubted upon this, that the Commiſſioners and Jury have a right to inſpect the perſon of the lunatick, and examine him before them; and, I believe, moſt commonly do ſo. They do not always cauſe him to be brought before the Commiſſioners, unleſs a conſiderable doubt was raiſed on the evidence as to his ſanity: but they have a right to require it; and it has been determined in this court, that, if the Commiſſioners think it proper, he ought to be produced before them without the prior order of this court: and if the perſons, in whoſe cuſtody he is, have refuſed to produce him, the court has blamed them extremely, and made them pay coſts. The other thing creating a doubt was, that in common ſtanding orders of the Great Seal for theſe commiſſions they are to cauſe a Jury of the county and neighbourhood, where he reſides, to be returned; which *primâ facie* carries an evidence, that he is ſuppoſed to be reſident in ſome county in *England*: but notwithſtanding this is the common form, and what is uſually and ought to be done in common caſes, that does not determine, that in all caſes of neceſſity it muſt be ſo. Theſe Commiſſions are of a various nature: the old way was by writs directed either to the Eſcheator or Sheriff; the modern way, and for a long time, is by commiſſions in nature of theſe writs; and ſo it is called, a writ *de lunatico inquirendo*. Theſe writs were variouſly directed; but I cannot find any precedent of a writ to the Eſcheator to inquire of the lunacy of any perſon, which I take to ariſe from hence: the Eſcheator was an officer of the county to enquire of the revenue of the crown, and therefore where lands come to an alien, or on forfeiture, or death of a tenant *in capite*, to the King where the guardianſhip came to the crown, the writ went properly to the Eſcheator to enquire, becauſe it was for the profit and intereſt of the King, and the Eſcheator was an officer for revenue of the crown. But in the caſe of a lunatick, where the King is to take no profit to himſelf, but merely a right ariſing from the care the King as father of his country is to take of all his ſubjects not capable to take care of themſelves, there ſhould be no writ to the Eſcheator, who, I believe, was not a proper officer for that. It is true, that in all writs to the Eſcheator there is a direction that he ſhould go to the party: but is not to found his return thereon, for he muſt have the Jury beſide: whereas the writ to the Sheriff in thoſe inſtances in *F. N. B.* and the Regiſter, does

Commiſſioners and Jury have right to inſpect the perſon.

Coſts if not produced.

The common form of theſe orders not of neceſſity to be obſerved in all caſes.

The old way by Writs to Eſcheator or Sheriff: the modern, by commiſſion.

does not direct the Sheriff to go to the perſon: the reaſon of which diſtinction I cannot find; nor does there ſeem, that any good reaſon can be given for it. But whatever was the ground thereof, the commiſſions have put that out of the caſe; for the commiſſions (the form of which is printed in the Regiſter 19) direct not to go to the perſon, but to make the inquiry. The ground of turning theſe writs into commiſſions was, that, as it ſtood by law as to lands of aliens, or on forfeitures, or guardianſhips where the crown was to have the cuſtody, &c. they might be by writ to the officer of the King or to the commiſſioners; and as they might be to one or the other, and the commiſſions were more large, they fell into that. The forms are various; ſo that nothing ariſes from thence to ſhew the law to be, that the lunatick or idiot muſt be in *England*. Then to conſider it on the reaſon of the thing there can be no good reaſon, why, if any ſubject having an eſtate in *England* happens to be an idiot or lunatick but is out of the kingdom, there can be no inquiry here. No inquiry can be made beyond ſea; for it is not to be executed by the Commiſſioners only, as in taking an anſwer or aſſigning a guardian, which may be executed beyond ſea, but there muſt be Jury to enquire of the fact; which muſt be of a county in *England*: then if no inquiry can be here, both the perſon and his eſtate would be in a very unfortunate caſe, and alſo the King as to his prerogative. As to idiots the King has an undoubted prerogative; and that prerogative has prevented a great many proceedings for the care of idiots, and has occaſioned a jury to find the contrary in many caſes in order to avoid that. But if any one can convey the idiot beyond ſea, the King cannot have the benefit of the lands and perſon, as he ought. As to lunaticks it would deprive them of that care and protection they are intitled to from the King, which he is bound by his regal authority and power to exert; for then no ſuch commiſſion would iſſue or care be taken, which would be very unfortunate. This whole matter muſt be inquired before the Commiſſioners and Jury; ſo that no miſchief can ariſe from this. If they are ſatisfied by clear evidence, that he is a lunatick, they will find ſo without inſpection; if not ſatisfied without inſpection they will make no verdict, or return, that he is not, and there it muſt reſt, nor can any effect ariſe from it. Nor is this concluſive; for if he is beyond ſea, and is of ſound mind himſelf, the laying hold of his lands is notice to him, that ſuch proceedings are againſt him, and he may come and appear, or any perſon oppoſing the commiſſion in his behalf will be heard, and if inſiſted upon, and reaſonable evidence laid, he muſt be then inſpected. I am therefore of opinion, there is ground to iſſue a commiſſion, and that according to the nature and circumſtances of the caſe; and that the common form of theſe orders is not evidence of the ſtrict confined rule of law,

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that cannot be exceeded. As to what Lord *Coke* ſays in *Beverley*'s caſe, the reaſon given there is not the right or true reaſon; for there would be no fruit of a commiſſion of lunacy or idiotcy againſt a perſon dead. The next conſideration is in what county to be directed; for it cannot be in the common form? I am of opinion, it ought to iſſue into *Eſſex*; for there is the manſion-houſe; which is ſuppoſed to be the place of reſidence, and is conſidered as ſuch, as in parochial payments and other caſes; and it is better to do ſo here than to find out the county, where he laſt was, or the neareſt county in *England* to *St. Venant*, this being of uſe as great part of the enquiry relates to the eſtate in *Eſſex*, where the manſion-houſe and great part of the eſtate lies.

Ex Parte Hillyard. *Aug.* 6, 1751. Caſe 130.

S.C. 1. Atk. 147. But there the case is reported at large; & it appears, as if what is here reported was a mere dictum of Ld. H. in the course of the case. But see S.P. adjudged in 2. Stra. 899. S.P. also acc. 1. P. Wms. 703. by Ld. Macclesf.

LORD CHANCELLOR.

Bankruptcy must be a debt in law.

IF a debt in law is not made out, though ever ſo ſtrong a caſe of a debt in equity, it will not be a foundation for a commiſſion of bankruptcy.

Ex parte Price. *Aug.* 5, 1751. Caſe 131.

Solicitors have a lien on the fund.

PETITION to be paid his bill of coſts in taking out a commiſſion of lunacy out of the fund of the lunatick's eſtate, and not to be obliged to come under the commiſſion of bankruptcy againſt him who took out the commiſſion of lunacy.

LORD CHANCELLOR.

Solicitors have this equity allowed to them to be intitled to a ſatisfaction out of the fund for their expences, whether it was in the way of ſuit, or proſecution in lunacy or bankruptcy.

Lord Donegal's Caſe. Caſe 132.

Idiotcy. Lunacy. Commiſſion denied; though of very weak underſtanding.

IN 1750 a petition having been preferred for a commiſſion of lunacy againſt Lord *Donegal*; *Lord Chancellor* ordered a perſonal examination, which was neceſſary, a *Caveat* being put in. Upon the examination in court and aſking him ſeveral queſtions relative to his eſtates in *England* and *Ireland*, the ſituation and value thereof, and his reaſons for his expecting a great riſe and improve-

ment from the *Iriſh* eſtate, to all which he gave very rational anſwers, but not to any queſtions touching figures, as to which he could not anſwer the moſt common, *His Lordſhip* did not think that a foundation to grant a commiſſion.

June 15, 1751, a new commiſſion was applied for on matters ſince appearing.

1 Wil. 702.

Lord Chancellor ſaid, what was done before, was by no means concluſive; and in Lord *Wenman*'s caſe no leſs than three commiſſions were applied for, before he was found *non compos*. The matters ſince appearing were much more material than anſwering queſtions of figures, *&c.* ſuch as making a will and revoking it, granting judgments, *&c.* but there having been a perſonal examination formerly, he thought, he could not go on now without a new inſpection.

Finding idiots for ſo many years, good.

April 22, 1752, *Lord Chancellor* ſaid, an idiot was ſuch, as was ſo *ex nativitate*; and therefore the court at common law held, that finding a man idiot for ſo many years paſt was good; for finding him idiot was including, that he was ſuch from nativity, and the reſt was mere ſurpluſage. Lunacy is a diſtemper occaſioned either by diſorders or accident; and to one of theſe two caſes were commiſſions at firſt confined: but in ſome time this part of the prerogative, this paternal care, was enlarged and extended to one, who is *non compos mentis*: but here it ſtopt, and this at leaſt, this court inſiſts, muſt be found to intitle any one to a commiſſion: and therefore though a jury finds, that one is incapable of managing his affairs, yet ſuch a finding is not ſufficient, but they muſt expreſſly find him to be of unſound mind. In the preſent caſe I allow, Lord *Donegal* is of very weak underſtanding and of no reſolution of mind: but that is not ſufficient for me whereon to ground a commiſſion. If I was to grant any, it muſt be that of idiotcy; for no time is mentioned, when he was of better underſtanding. Beſide the petition is in behalf of infants, whoſe remainder might by this means be defeated; but this court will take care, that an infant ſhall never be hurt by any propoſal that may be made in his name. It is objected, that there muſt be a very large perſonal eſtate at death of Lord *Donegal*, and if the commiſſion is not granted, he may diſpoſe of it by will: but fraud and impoſition upon weakneſs is a ſufficient ground to ſet aſide a will of real, much more of perſonal eſtate; and yet ſuch weakneſs is not ſufficient to ground a commiſſion. There was a caſe in Lord *Harcourt*'s time, where, though one could not be proved a lunatick, yet from the impoſition upon his weakneſs this court relieved againſt a deed obtained from him; immediately after the decree the grantee in the deed got a releaſe of the decree from him:

him: againſt this alſo the court relieved: and I have heard it ſaid, that Lord *Harcourt* ordered, that he ſhould not execute any future deed but with conſent of the court. It may be very difficult to draw the line between ſuch weakneſs, which is the proper object of relief in this court, and ſuch as amounts to inſanity; however the denying a commiſſion does not exclude from relief againſt any deeds or wills, which may be improperly obtained.

Serjeant Prime *verſus* Stebbing, *July* 1, 1752. Caſe 133.

Lands deviſed to wife, not a ſatisfaction or performance of covenant in marriage-articles that lands ſettled on her were of ſuch value; the intent being that ſhe ſhould have them over and above.

JOHN SHEPPARD having by his marriage-articles covenanted, that the lands ſettled on his wife were of the annual value of 1,600*l.* above all incumbrances, made his will in this manner: "I do hereby ratify and confirm my marriage-"articles, and I do alſo give to my wife all my lands in *A. B.* "for life."

The wife and her ſecond huſband brought this bill in her right to have a deficiency in her jointure-lands ſupplied; which was not diſputed: but it was inſiſted, the lands deviſed ſhould be taken inſtead thereof.

For Plaintiffs. The lands deviſed are not equal to thoſe covenanted to be ſettled, and therefore cannot be a ſatisfaction. In *Eaſtwood* v. *Stiles, June* 1731, the queſtion was, whether a deviſe of an eſtate of 85*l. per ann.* was a ſatisfaction in the whole or part of an agreement to ſettle an eſtate of 100*l. per ann.*? The *Maſter of the Rolls* held, the repreſentatives had the ſame election, the teſtator had, as the time had not elapſed; but that if the time had elapſed, he might poſſibly be of another opinion: but independent of that he held it no ſatisfaction; firſt becauſe the lands were not equal in value to what was to be ſettled; next becauſe it was a deviſe of part freehold and part copyhold, and as copyhold could not be ſettled, and both given together, teſtator could not intend a ſatisfaction: but the firſt was the governing reaſon. This was affirmed by Lord *King* 29 *April* 1732. Where teſtator ſays, *I give*, he intends a bounty; the ſame as if he ſaid *over and above*. It has happened to be determined by a caſe a great while ago, that a legacy ſhould be a ſatisfaction for debt; yet never unleſs equal or greater. This can only be a preſumed ſatisfaction; and in caſe of a wife the court does not generally favour ſatisfaction, either where it ariſes under articles or dower at common law. *Lawrence* v. *Lawrence* (2 *Ver.* 365. *Eq. Abr.* 219.) all caſes of ſatisfaction ariſe from a ſuppoſed intent; but it is clear from this will there was no ſuch intent, it confirming the articles expreſſly.

For Defendants, Executors, and Legatees. This is not a caſe of ſatisfaction, but of performance. Satisfaction is, where one thing given in lieu of another; always means an equivalent: in which caſe it is attended with ſeveral rules, as to the value, and that it muſt be total, not in part, *&c.* whereas performance may be in part, *Lechmere* v. *Lechmere.* It is a performance by getting the very thing itſelf. *Wilcox* v. *Wilcox*, 2 *Ver.* 558. *Blandy* v. *Widmore*, 2 *Ver.* 709. 1 *Wil.* 324. *Lee* v. *D'Aranda**, *Hil.* 1746-7, though partial, it is ſo far a performance.

* Ante 1.

Another queſtion was made upon *John Sheppard*'s further covenant; which recited, that as he was to be abſolutely intitled to all his wife's perſonal eſtate, in conſideration of the ſaid portion and perſonal eſtate, and for making a further proviſion for his ſaid wife and the iſſue of the marriage, he covenants in reſpect of any ſum, that ſhould come to her afterward, that he will then make a further ſettlement upon her in the ſame proportion of 100*l.* *per ann.* for every 1000 *l.* and ſo for a leſs ſum; and that if he ſhould die in her life without iſſue, or if ſuch iſſue ſhould die in her life, then ſhe ſhould be paid back a moiety of all ſuch ſums, as he ſhould *receive* as her portion. They had brought a bill for an account, of what ſhould be due to her out of her grandfather *Chaplin*'s eſtate, and obtained a decree for it: but he never acted under it, and refuſed to accept 400*l.* part of the ſaid eſtate, which was offered him by the perſon, in whoſe hands it was. The queſtion was, whether the plaintiff's wife was intitled to have a further jointure of 40*l.* *per ann.* and alſo to have a moiety returned to her out of his eſtate; it being inſiſted for defendants that ſhe was not ſo intitled, as her huſband had not in his life actually received it?

LORD CHANCELLOR.

This is as extraordinary a caſe to come into a court of equity to ſupply the deficiency of a jointure or ſettlement, as any that has come into the court: yet the ſame rule of juſtice muſt prevail, and if a huſband upon his marriage in conſideration of diſparity of years or any other perſonal conſideration will make a very large ſettlement, whatever that is, the parties claiming under it, whether wife or children, are intitled to have that carried into execution according to the intent, notwithſtanding the huſband has agreed in an extraordinary liberal manner, beyond what is the rule. I muſt therefore go by the ſame rule, as if the ſettlement was made in the uſual terms.

As to the firſt queſtion the defendants do not diſpute, but that notwithſtanding the largeneſs of this ſettlement the plaintiffs are intitled

intitled to have any deficiency of jointure on the foot of the covenant ſupplied and made good: but inſiſt, that the court ought to conſider, and according to the rules eſtabliſhed to allow the lands deviſed to be either a ſatisfaction or performance, or at leaſt part-performance, of this contract, and to go ſo far as they may in point of value to make up the deficiency. If the court can in any caſe do that, they ought in this; but I am of opinion, that if allowed in this caſe, I ſhould make a precedent not agreeable to the rules eſtabliſhed, and which might be of ill conſequence and inconvenience in other caſes. The ſame rule of juſtice therefore muſt prevail in this as in others. The huſband was bound by his contract to make the jointure, then ſettled to the value of 1600*l. per ann.* this was therefore what ſhe had a right to as a purchaſer; and whatever aroſe from thence was her own eſtate, which ſhe was intitled to as a debt from her huſband to her. Then to conſider what he has done by his will. In the very firſt clauſe he ſeems anxious for and to take care of her; therefore it cannot be imagined he intended to prejudice her. The huſband's covenant, that theſe lands are of ſuch annual value, does amount to a covenant on his part to ſettle and make good to that extent in caſe of deficiency; for ſhe might have damages: therefore it has been argued, that when the huſband by his will has given lands of the ſame or in part of the value, that is ſo far a performance of his covenant; for that he has by that act ſo far made it up. It is compared to caſes, where a huſband covenants to ſettle on the eldeſt ſon of the marriage, and lets lands deſcend to him in fee; which is conſidered as a performance ſo far; and where huſband covenants, and dies inteſtate, which was held a leaving to his wife ſo much; becauſe whether left by will or to go by the rules of law it was the ſame and a performance; and indeed it was a ſtrict performance. So where lands deſcended to an heir at law, who claimed in place of his anceſtor a ſum of money to be laid out in land. But I am of opinion, this differs from all the caſes that have been of that kind. It has been conſidered, whether this is to be taken as a queſtion of ſatisfaction or of performance: and poſſibly it may be more properly conſidered as a queſtion of performance or part-performance: but in my opinion this is not ſtrictly any of thoſe caſes. It is a queſtion of conſtruction of a will, and of intent of the huſband therein. All the above-mentioned caſes have been of implied ſatisfaction or preſumed performance, where the huſband or father has done nothing, as in the ſuffering lands to deſcend without any declaration what way he intended they ſhould go. The court was there to conſider from circumſtances, whether there was ground to imply or infer a part-performance, the perſon having ſaid nothing: but here is a will made, and therefore the queſtion is upon the conſtruction of that will, and the intent to be put on that conſtruction: and he could not intend to give theſe lands thereby as a ſatisfaction

Caſes of implied ſatisfaction and preſumed performance of articles.

tion for what ſhe was in ſtrictneſs of law intitled to under the articles, but clearly as an accumulated bounty over and above. It is the ſame, as if he had repeated every *iota* in theſe articles, and ſaid, that every clauſe therein ſhould be performed, and then ſaid, I alſo give her ſuch lands. An inquiry therefore muſt be directed of the deficiency of the jointure; and, whatever it is, muſt be made good out of the eſtate of *John Sheppard*.

As to the next queſtion it is perhaps the moſt extraordinary part of this ſettlement; and on that I have had ſome doubt: but on all the circumſtances I am of opinion, ſhe is intitled to what the plaintiffs inſiſt upon: that is the meaning of theſe articles, and it is impoſſible for the court to get the better of it. There was at the time of the ſettlement a proſpect of further ſums, to which ſhe would be intitled, and was to have this further ſettlement in conſideration of it. The queſtion is, whether this 400*l.* or whatever elſe ſhall be coming under this decree, is to be conſidered as ſome part of the perſonal eſtate of the wife, in conſideration of which ſhe was intitled to this further ſettlement, and to have a moiety returned her. That depends on the covenants; there is certainly a variety and ſhortneſs of expreſſion in the clauſes; but I muſt found myſelf originally on the recital in the articles, of what was the agreement, which has very general words, and is expreſs, that the huſband ſhall be intitled to all the perſonal eſtate of his wife abſolutely. That muſt mean, all, whether in poſſeſſion or action, that ſhe became intitled to during coverture, and which he might in her right have had, if he had uſed diligence for it is within this covenant. Whatever indeed came after the coverture was determined, which ſhe had not poſſeſſion of nor was intitled to before, would be her own eſtate. The decree alſo has expreſſed, that he ſhould return a moiety, not only of what he ſhall have received, but of what he ſhall become intitled to, in her right. He clearly was ſo intitled to what was to riſe out of *Chaplin*'s eſtate, in law in her right, and in equity by way of abſolute property, and which nothing could defeat him of: there is no ground then for the court to ſtop ſhort, and draw the line at his actually receiving it. He might: it was his lacheſs in not carrying on the decree. It is objected, where is the harm? and that it is unreaſonable, ſhe ſhould have ſuch a jointure and a moiety returned. But notwithſtanding the ſhortneſs of the covenant which is for ſecurity of the wife's jointure, yet upon the recital the further ſettlement to be made on any further part of the eſtate coming in, was to be made not only on the wife, but on the iſſue. Then ſuppoſe, there had been a ſon, and a decree for this, and the wife had ſaid, ſhe would claim no additional jointure, but claimed the whole money as her's in point of law by ſurviving her huſband,

who

who had not received it, that ſon would have a right to oppoſe this and ſay, he was by this agreement intitled to have it ſettled on him in tail, and that his mother ſhould not run away with it: the court muſt have ſo decreed upon theſe articles and a bill by that ſon. If ſo there muſt be the ſame conſtruction in both caſes, there being no diſtinction between what it would have been, if there was iſſue, and if not: and this was the intent of the articles. The plaintiffs therefore in ſtrictneſs of right are intitled to that decree.

Scrafton *verſus* Quincey, *July* 2, 1752. Caſe 134.

Sir *John Strange*, for *Lord Chancellor*.

Deed of appointment of lands in Middleſex purſuant to a power in a former, poſtponed to a mortgage ſubſequent to, but regiſtered before it.

THE plaintiff came into court under a mortgage-deed in *Sept.* 1746, to be paid 500*l.* advanced by him to *Thomas Robertſon*, and intereſt, or to have the eſtate ſold, and to be paid thereout.

The objection thereto was, that *Robertſon* had no power to convey to the plaintiff, becauſe he had before properly conveyed or appointed the premiſes for benefit of others; for that by deed and fine in 1742, this eſtate was ſettled to uſe of him and his wife, and afterward to ſuch uſes as he and ſhe or the ſurvivor by deed or will ſhould appoint. This power was by a deed in 1744, executed by the huſband and wife, and appointments made therein for the benefit of the defendants; who therefore claimed prior to the plaintiff's mortgage in 1746.

It was anſwered, that the appointment of the uſes of that deed and fine cannot be ſet up againſt the plaintiff, becauſe the premiſes lie in *Middleſex*, where there is a regiſter act, by which this deed of 1744 will be void againſt the plaintiff as not being regiſtered until 1748: whereas his incumbrance was regiſtered in 1746 immediately after the date.

For Defendants it was argued, That this deed in 1744 was not of ſuch a nature, as was required by the ſtatute to be regiſtered; and was compared to the caſe of a deviſe of Copyhold wanting the formalities in the ſtatute of frauds; which ſtatute has very general words; yet, though ſuch deviſe has no atteſtation at all, it will paſs; becauſe it paſſes not by the will, but by the antecedent ſurrender; which ſhews, this court will take into conſideration the nature of the inſtrument to ſee, whether or no it is within the act of parliament. That is indeed the caſe of a will, this a deed or conveyance: but not a deed or conveyance within

the ſtatute, for the defendants derive no intereſt under the deed, but it is a mere power of appointment, and ſo juſt as a will of copyhold is not within the ſtatute of frauds. The defendants therefore will have prior title.

Maſter of the Rolls.

Conſider the intent and meaning of the act. This caſe is clearly within the miſchief recited; for here is a perſon in 1746 lending out his money on land ſecurity, and what is to defeat him, is a deed in 1744, prior to him. He is clearly the very perſon intended, being by a ſecret or pocket deed to be defeated of the incumbrance, he has advanced his money for, and taken care to regiſter. He has uſed all due diligence required by the ſtatute, and is therefore *prima facie* intitled to the relief prayed. Next to conſider whether the deed or inſtrument is of ſuch a nature as to be within the proviſion of this act. The words are general, all deeds and conveyances. This is undoubtedly a deed: was executed as ſuch; and conveys ſo as to affect lands, tenements, and hereditaments; becauſe thoſe claiming under the execution of the power claim under a deed, which, as far as it can operate, affects lands, *&c.* But it is ſaid, this deed is not to be conſidered as a ſeparate conveyance, but only the execution of a power; and that all of it ariſes under the deed in 1742. If that conſtruction was to prevail, there would be an end of the regiſtry and of the act of parliament; for by this means a ſecret deed might be ſet up to defeat him, who had regiſtered before. This then being a conveyance, actually affecting the lands, though in virtue of a preceding power in another deed, is within the intent of the ſtatute and common underſtanding ſuch an incumbrance, as ought to have been regiſtered: otherwiſe an innocent perſon induced to lend his money on land ſecurity would be defeated. The plaintiff is therefore to be conſidered as a prior incumbrancer.

Caſe 135. ——————, *July* 4, 1752.

Injunction againſt uſe of a market refuſed.

Remedy at law. If after title at law eſtabliſhed.

MOTION for injunction to ſtay the uſe of a market ſet up by defendant *Brown*.

Lord Chancellor refuſed it, ſaying this was a moſt extraordinary attempt, of which he never knew an inſtance before. The plaintiff has ſeveral remedies: there may be a *Scire facias* in the name of the crown to repeal letters patent granting a market to the prejudice of his market as being too near thereto; or without the aid of the crown he may have a common action upon the caſe for the prejudice to his market; whereas the plaintiff comes originally into this court for this injunction. What great confuſion would it cauſe to bring all the perſons, who uſe this

market, into contempt upon the injunction; and to what purpoſe? If in any caſe this court ought to interpoſe, it would be after the title was eſtabliſhed at law; which is not done here, though there are ſo many means of doing it. Injunctions are granted to quiet in poſſeſſion, as at the time of filing the bill and three years before: but that is drawn from the equity on the ſtatutes of forcible entries. Upon the equity founded on that ſtatute, where there has been ſuch poſſeſſion for three years, this court will prevent before hand: but there is no ſuch ſtatute in this caſe: it is founded on the common law, which gives the abovementioned remedies. This court will not interpoſe before the title at law is eſtabliſhed: though I will not ſay, that even then the court will not interpoſe, becauſe of the inconveniencies.

Lewin *verſus* Lewin, *July* 6, 1752. Caſe 136.

Annuity by will to wife unprovided, on deficiency of aſſets not abated in proportion with other legatees; upon the intent of teſtator.

LEWIN having a wife and two children, by will gives an annuity of 120*l.* to his wife during her natural life, payable half yearly, ſubject to limitations over if he had a ſon, *&c.* afterward directs his executors to purchaſe, if they could, the ſaid annuity of 120*l.* in government ſecurities of ninety-nine years or ſome other longer term: if they could not do that, his executors ſhould purchaſe lands of 200*l.* a year value to be ſettled ſo, as that the ſaid annuity ſhould be to his wife free from taxes with remainders over. He directs, that if he ſhould leave any child living at his death, his executors ſhould out of the profits of the reſidue of his eſtate pay to his wife 30*l.* *per ann.* for maintenance of ſuch child. He gives legacies to ſome collateral relations and friends, and all the reſidue of his eſtate both real and perſonal to be put out to and for the beſt advantage for every child and children at his death, equally to be divided ſhare and ſhare alike, to be paid them at their reſpective ages of twenty-one or marriage.

This bill was brought by the wife for payment of her annuity and arrears, inſiſting that though on deficiency of aſſets the general principle was againſt the plaintiff, whoſe annuity would abate in proportion with other legatees according to later determinations, yet conſidering the perſons for whom this proviſion was deſigned, a wife and children, and the particular manner in which it is given by the will, it ought not upon the deficiency to ſhare the fate in common with the other pecuniary legatees. This annuity is in nature of a ſpecifick legacy; for that is not confined to what is called, an individual legacy exiſting among teſtator's property at the time of his death, but includes alſo any thing to be purchaſed by his executors. The other parts of the will ſhew, he did intend, this proviſion ſhould be clear of any deduction

tion whatever. He has made two reſidues; firſt where he directs the maintenance out of the profits of the reſidue, which conſtitutes a remainder of the perſonal eſtate after firſt taking out this annuity or the fund to purchaſe this annuity; and then a ſecond or general reſidue after taking out the intermediate legacies.

For Defendant. This is no ſpecifick legacy in any light, not being a deviſe of any thing the teſtator had or intended to have during his own life, but a general deviſe of a ſum of money out of his perſonal eſtate to be laid out to particular purpoſes: nor has the court ever from a form, in which a legacy is to be enjoyed, conſidered it as ſpecifick: nor has a wife or children any preference ſo as not to abate in proportion with other legatees. In *Brown* v. *Allen*, 1 *Ver.* 31. was a very ſtrong circumſtance to ſhew intent of teſtator to prefer one legatee to the others: yet on deficiency he abated in proportion. This is not to be conſidered as two reſidues of his eſtate, but as one; and amounts only to this, that after this annuity, he has directed maintenance for his children out of the general reſidue of his eſtate; then gives pecuniary legacies; and then directs, what ſhould be done with the principal or capital, if any, which he did not intend to be divided among them until twenty-one or marriage.

LORD CHANCELLOR.

All theſe teſtamentary cauſes depend on the particular penning of the will or teſtament, and the intent ariſing, which is to be collected out of the words of the teſtator, and the order in which he has placed them. It is certain, that the placing the words or clauſes in a will in different orders does often not induce the court to make a conſtruction to vary the intent of teſtator, but that notwithſtanding the clauſes are placed out of time in the will, the general rules ſhall prevail; as the court ſtill lets ſuch rules prevail on the whole, though wills are commonly inaccurately made, teſtator being conſidered as *inops conſilii*. But this is a very ſtrong caſe to ſhew, that this annuity, and the fund for it, was intended by the teſtator to be preferred to all the other legacies in the will. It is not ſuggeſted, that either the wife or children have any other proviſion; and when a man is ſo ſituated, as he was, and (as appears from other words in the will) having a proſpect of more children, and no proviſion by ſettlement or otherwiſe under which his wife or children could claim, it was natural for him in making a diſpoſition of his eſtate ſo to give it, that their proviſion ſhould be in the firſt place, and not to abide by the contingency of his eſtate producing more or leſs at the time of his death, and of ſharing in proportion with others, ſtrangers in blood though friends to him,

or

or collateral relations, to whom he had given legacies: it was natural, he ſhould not intend, they ſhould abide by that event, though that is the general rule of law. As to annuities, whether to be conſidered as ſpecifick legacies; there have been caſes in this court, in which annuities in general have been ſo conſidered; becauſe it is a direction of the teſtator, that his perſonal eſtate ſhould be a fund to anſwer that. I believe, the firſt caſe, in which that was broke in upon, was by Sir *Joſeph Jekyl*, when he was firſt *Maſter of the Rolls*, in *Alton* v. *Medlicot*, where there was not a gift, but a direction in the will to lay ſo much out of the perſonal eſtate to purchaſe an annuity; which he held a pecuniary legacy and to abate in proportion. Afterward the court conſidered, that the diſtinction was extremely nice between ſuch a direction in the will and a gift in the will of that annuity out of his perſonal eſtate; that in ſenſe and reaſon it amounted to the ſame thing; therefore, and as the court endeavours to favour equality, there has been ſince, I believe, a determination, that even an annuity by will out of perſonal eſtate by way of direct deviſe or legacy ſhould abate in proportion with pecuniary legatees: but ſtill that is only in general caſes; for the intent of the teſtator on the conſtruction of the will muſt be followed; if he prefers ſuch annuitant before other legatees. This caſe is very ſtrong for that; for it is natural, that his wife and children ſhould have this out of his eſtate before the gift to ſtrangers; and, as appears to me, he has expreſſed that. There certainly may be caſes, wherein ſuch a conſtruction may be made, as the defendant's counſel inſiſt upon as to theſe reſidues: but the queſtion is, whether that was his intent? To find out which conſider the conſequence, it is this; that I muſt preſume, he intended, the whole maintenance for his children at the time of his death ſhould depend on this contingency; whether there would be any ſurplus after purchaſe of this annuity, (the whole of which was to go to the wife for life) and after all theſe pecuniary legacies to collateral relations; which were merely voluntary in him, he not being under obligation to make proviſion for them, as he was for his children. I am of opinion, that is an unreaſonable conſtruction, and contrary to the intent. It is ſaid, there are caſes, wherein the court has gone a great way to level legatees, and make them abate in proportion, as in *Brown* v. *Allen*. I do not remember the ſtate of that caſe; and there may be a difference in the ſtate of it; for if the teſtator ſays, "*Imprimis*," or "in the firſt place, I give ſuch a legacy," that amounts only to the order, in which he expreſſes his gifts in the will; to nothing more. But if he had ſaid "to be "paid in the firſt place," and it had been in that caſe a proviſion for a wife, I ſhould have doubted of that determination; and ſhould have inclined to think, it was a declaration of his intent,

that that proviſion for his wife ſhould come out of the perſonal eſtate, and be paid in the firſt place; becauſe there is ground for that from the preference to a wife and children unprovided for. If indeed in that will they all ſtood in equal degree, it was ſufficient ground for the court not to preſume a preference; but if it was a proviſion for a wife or child unprovided, that is different: but this is a ſtronger caſe from the other obſervation. I am of opinion therefore, that this annuity muſt be preferred.

Caſe 137. Rudſtone *verſus* Anderſon, *July* 7, 1752.

At the Rolls.

Surrender of a leaſe of tithes and taking a new leaſe, after deviſe thereof with the eſtate; the tithes paſs not without republication of the will.

TESTATRIX deviſes "all my lands, tenements, and he-"reditaments at *Weſtow* in *Yorkſhire*, and all my tithes and "eccleſiaſtical dues payable out of *Weſtow* aforeſaid or any other "towns or places near the ſame."

At the time of making the will ſhe was ſeiſed in fee of her eſtate at *Weſtow*, and poſſeſſed of a leaſe of theſe tithes under the Archbiſhop of *York:* but after making this will ſhe ſurrendered that leaſe, and took a new one; of which ſhe was poſſeſſed to the time of her death.

The queſtion was, whether theſe tithes were to be conſidered as given by her will to the perſon, to whom *Weſtow* eſtate was given, or whether by the alteration of the nature of her intereſt they are ſeparated from the eſtate at *Weſtow*, and make part of her perſonal eſtate?

That it was the ſame, as if ſhe had in terms given the leaſe, which ſhe held; and that this renewed leaſe was a revocation, was cited *Sir Thomas Abney* v. *Miller*, 10 *June* 1743. where one poſſeſſed of two different college-leaſes deviſed them particularly to two perſons, and afterward ſurrendered one, and entered into an agreement for ſurrender of the other: as to the laſt, *Lord Chancellor* held, that did not create an ademption, nor make any alteration, for that ſtill the legal intereſt was in him, though he had agreed to alter it: but as to the other actually ſurrendered that was altered, and the intereſt under the new leaſe would not paſs: that if an ejectment was brought, and the executor had aſſented, the legatees could not have recovered the renewed term, becauſe by the ſurrender and acceptance the term or thing itſelf was gone, and a new one acquired: that a houſe deviſed, which is afterward rebuilt, will paſs, becauſe that is the ſame thing: but a term granted, and a new one taken, is another thing. In Lord *Lincoln*'s caſe a ſettlement was held a revocation of a will though contrary to the mind

1 *Ch. Ca.* 2 *Atk.* 593.

of

of the owner; which ſhews, the court goes on the ſame principles, without entering into the queſtion whether it was a revocation according to the intent. Revocations are frequently adjudged here againſt the intent; as a deviſe of annuities which are afterward ſubſcribed by act of parliament, was held a revocation in *Thompſon* v. *Roebottom*, 22 *July* 20 *G.* 2. The caſe of *Carte* v. *Carte* in 1744. (cited on the other ſide) was on very particular circumſtances. The father of Mr. *Carte* the hiſtorian being ſeiſed of the equitable intereſt of a college-leaſe made a will annually, and repeated it: it happened, that after renewal of the laſt leaſe he had failed to make a will: but that was accounted for: and on thoſe circumſtances *Lord Chancellor* conſidered it as a kind of accident, and the intent was plainly ſhewn by ſuch frequent repetitions of his will.

Sir *John Strange*.

No doubt but that by this will the teſtatrix deſigned, both her eſtate and tithes ſhould go toge her, ſhe giving them in the ſame breath and ſentence to the ſame perſon: however if by any accident that ſuppoſed intent cannot take effect in point of law, the rule of law muſt take place againſt that; and conſequently ſo far as ſhe has not well deviſed, it muſt fail. I own, I cannot ſee any real diſtinction between the words in this will "*all my tithes at Weſtow*", and if it had been "*all my leaſe or intereſt in that leaſe at Weſtow*"; becauſe that muſt refer to the intereſt, ſhe had at the time of making. That intereſt does not remain at the death of teſtatrix; for by the ſurrender ſhe ſo far altered her intereſt, that what were her tithes under the leaſe at making the will, cannot be conſidered under the foot of this clauſe as being the ſame at the time of her death; but ſhe acquired a new eſtate in them to commence at, and run out to, a different period of time. The queſtion then is, whether this is in ſuch a light, as will ſufficiently paſs theſe tithes, her property in which were ſo greatly altered by the ſurrender and acceptance of a new leaſe? *Sir Thomas Abney* v. *Miller* (as ſtated to me) is in point; for it was held, that the leaſe being thus altered the intereſt under the new leaſe would not paſs. There is no difference between that caſe and this. There it was mentioned *his eſtate:* here it is *my tithes*, that is, *my eſtate in the tithes:* ſo that though it may be a little harſh in a caſe of this nature to ſeparate theſe intereſts, yet I cannot ſee, how the court can ſay, theſe tithes under the deſcription of this will have not received ſuch an alteration in their nature as to require republication of the will. It muſt then be conſidered, that the teſtatrix acquired a new intereſt ſubſequent to the will; and conſequently they will not paſs by the words uſed, but go into her perſonal eſtate.

Blower

Caſe 138. Blower *verſus* Morret, *July* 10, 1752.

Legacies. Pecuniary legatees abate in proportion, notwithſtanding a direction in the firſt place or time of payment: but it may be otherwiſe on a ſtrong intent, or if it is a purchaſe of dower and wife intitled to dower.

LANDS were deviſed to truſtees to be ſold for payment of debts, legacies, and funeral: teſtator afterward gives to his wife a general legacy of 500*l.* "to be paid her immediately after "my deceaſe out of the firſt money belonging to me, that ſhould "be got in after my death; and it is my further will, that my wife "ſhall be intitled to the ſeveral legacies given to her, in full ſatis- "faction, bar, and diſcharge of all dower or thirds, which ſhe "might be otherwiſe intitled to out of my real and perſonal eſtate."

It was inſiſted, this 500*l.* legacy ſhould not abate in proportion with others, from the particular directions attending it, and being given to her for her better ſupport and maintenance, and intended as a proviſion for a wife, which is always favoured: nor does this break in upon any rule of law, it not being a diſpute as to creditors, but legatees. Teſtator has clearly given a preference to this legacy by directing it to be paid immediately; which would therefore carry intereſt immediately, if enough to anſwer all: whereas other legatees would not be intitled to intereſt until a year after. Beſide this is given in compenſation for dower; and *Burridge* v. *Bradyl*, 1 *Will.* 127. ſhews, that clauſes of this kind have had weight.

For defendant. Teſtator meant by the direction attending this legacy only to make it due to her ſooner than the other legacies, to bear intereſt if not paid, and not to wait until a year; and the court implies that for a child unprovided or for a wife. The year given to executors is upon an arbitrary conſtruction put on the ſtatute of diſtribution, that executors might have that time to look about them. If the plaintiff is to have a priority, it muſt be on this principle, that a legacy with direction to be paid immediately ſhall not on a deficiency abate in proportion with others, which have not that direction: but there is no ſuch rule: this only denotes the time of payment: and though there are ſeveral times in a will fixed to ſeveral legacies, if a deficiency appears, they muſt all partake of it. There is nothing in the will to ſhew, that if teſtator had thought there would be a deficiency, he would have made this ſo. In *Clark* v. *Sewell*, 6 *July* 1744. teſtator gave 10,000*l.* which he directed to be paid in one month after his deceaſe and to be laid out with all convenient ſpeed in the funds, and the intereſt to his mother for life. The firſt queſtion made was, whether that ſhould not be a ſatisfaction for another ſum of 2000*l.* *Your Lordſhip* held, it ſhould not from that direction to be paid in one month; for that the court would lay hold of any inconſiderable circumſtance in caſes of ſatisfaction: but there was a great deficiency to anſwer all the

legacies: and the queſtion was, whether this, deſigned as a maintenance for a mother, ſhould be preferred? It was held, it ſhould not, but ſhould ſuſtain the loſs. *Hinton* v. *Pink*, 1 *Wil.* 539. ſhews, Lord *Macclesfield* was not ſatisfied with *Burridge* v. *Bradyl.*

LORD CHANCELLOR.

Caſes of this kind, of a claim by pecuniary legatees of a priority of ſatisfaction, ſo as not to abate in proportion with others, ſeldom come before the court; and there are fewer, in which the court has given way to claims of that kind; there muſt be therefore very ſtrong words to induce the court to give way to it; for in moſt caſes the court has diſclaimed the laying weight on particular words, as the ſaying *imprimis* or *in the firſt place*, or a direction for the time of payment. All theſe are always diſclaimed, and that upon juſt and ſolid reaſons; becauſe if the court was upon ſuch grounds to give a preference to one pecuniary legatee, there would be no end of it, conſidering the variety of expreſſion and the incorrectneſs with which wills are frequently drawn; and therefore in *Brown* v. *Allen*, 1 *Ver.* 31. the court did not lay weight on a direction of that kind. Yet there may and have been ſome caſes, in which the court has thought the intent of the teſtator ſtrong enough for it; one of which came very lately before me, *Lewin* v. *Lewin*; the governing reaſon in which caſe was, that the teſtator had conſtituted two reſidues of his eſtate; the firſt to be computed after taking out the money for the purchaſe of the annuity to his wife; the other to be computed after taking out the money to the pecuniary legatees: but there is nothing of that in this caſe. This 500*l.* legacy affects the perſonal as well as the truſt of the real eſtate: but the direction *to be paid, &c.* is not ſufficient to give her a preference: for that only relates to the time of payment. He directs, that, whereas the general rule of law is, that legacies ſhould not be paid until a year, this ſhall be paid immediately. The conſequence is, that if it is not then paid, it ſhould carry intereſt immediately; which is always conſidered as a compenſation for delay of payment, and puts her in the ſame condition, as if it was paid. If therefore he had directed ſeveral different times of payment to ſeveral legacies, it might be as well ſaid, that thoſe given payable ſooner after his death than others ſhould not abate in proportion. Then the other words, "*out of the firſt money, &c.*" are only conſequential to the direction, that it ſhould be paid immediately; they are of no operation; and only a further explanation of his intent: but ſtill all the legatees muſt abate in proportion, whatever time of payment the teſtator has directed; for that will make no difference in right or in preference. But the moſt material point inſiſted on for the plaintiff is the clauſe as to dower. That may depend on ſome facts. There is to be ſure ſome colour and reaſon, that a man giving a

Ante, 6 July 1752.

legacy or proviſion for his wife may have an intent to prefer her; becauſe it is a duty, he owes to nature; and ſo of children: whereas the others are out of mere voluntary bounty or favour. If the wife was at the time of making the will intitled to any dower or thirds out of teſtator's eſtate, I am of opinion, ſhe would be intitled to a preference; and that upon the ground Lord *Cowper* went in *Burridge* v. *Bradyl*, that the teſtator by ſetting a price on her dower, if ſhe thought fit to take it, it became a purchaſe of her dower. So in deviſe of an eſtate for payment of debts and legacies, out of which eſtate the wife was intitled to dower, the teſtator might ſet a price thereon, if ſhe ſhould think fit to take it. The reaſon, Lord *Macclesfield* was not ſatisfied with this caſe when cited in *Hinton* v. *Pink*, was, becauſe according to the book there was a wrong ſtate of it, barely as if it was a gift of money to be laid out in land, without ſtating the circumſtance that it was given to purchaſe an annuity for the wife ſhe releaſing her dower; which was the true foundation of that determination; for I lay no weight on what is mentioned beſide by Lord *Cowper* as of ſome weight, that the annuities were to go to the children after the wife's death; for that was only as to the hardſhip; nor that it was directed to be laid out in land; which will not vary the caſe; for it is ſtill a pecuniary legacy, and muſt then abate in proportion. The ſtrong ground was, that it was a purchaſe of the wife's dower by giving her a ſum of money in lieu and ſatisfaction of and upon her releaſing it; and the wife may lay hold of that, if ſhe will. It is the ſame, as if teſtator ſays, "I give *A.* 500*l.* on conſideration that he conveys ſuch an eſtate to my deviſee or truſtee". *A.* has then an option to ſay, that is a contract; he cloſes therewith, and makes it abſolute; and will part with that eſtate for that money; and is not bound to abate in proportion with other legatees. So is this a purchaſe from the wife, and the price fixed by the huſband, provided there was any thing to purchaſe; which depends on a fact, whether the wife would be intitled to dower and had a title inchoate to dower out of his real eſtate; for if ſhe had a jointure in bar of dower before the making the will, I ſhould not then conſider it as a purchaſe, but only as a cloſing every thing; and the words are only of courſe, and amount to nothing, if ſhe was not intitled to dower.

Caſe 139. Nichols *verſus* Gould, *July* 10, 1752.

Purchaſe of reverſion not ſet aſide for under value after the event, there being no fraud.

THE plaintiff was a poor dragoon, intitled to a reverſion in fee of a ſmall eſtate after the death of a tenant for life, to whoſe firſt and every other ſon there was a remainder, but who then had no ſon nor was married. Defendant purchaſd this reverſion; tenant for life died in about a month after. The bill was to ſet aſide this conveyance as being at an under value.

LORD CHANCELLOR.

There is no proof of any fraud or impoſition on the plaintiff; nothing but ſuſpicion; and therefore it is too much to ſet aſide this purchaſe merely on the value. Every purchaſe of this kind muſt be on the foot of great uncertainty as to the value. The firſt of this kind, which may be purchaſed, is a reverſion after an eſtate tail; which the law does not conſider of any value: and yet by accident it may be a moſt valuable thing, and will take place in poſſeſſion, if tenant in tail dies without ſuffering a recovery: nor can the court ſay, it muſt be computed, how much it was worth on all the contingencies, as of the health of tenant in tail, *&c.* according to *Demoivre*'s rule. The next intereſt to that is the purchaſe of a reverſion after an eſtate for life with contingent remainders to the children of tenant for life; which is a better reverſion than the other; as it cannot be barred by tenant for life, until the contingent remainder comes *in eſſe*, and attains twenty-one, to join in the conveyance. But ſtill this is liable to uncertainty and difficulty in computation as to the value, which depends on ſuch a number of chances; as whether tenant for life is healthy and likely to have children, (in which caſe the reverſion would be worth but little) that it is impoſſible to compute it: and though they have rules in *London* to make ſuch a computation, ſtill there muſt be ſtrict evidence as to it; for no general rule can be laid down, it depending on the particular circumſtances of every perſon. Then will a court of equity, after the contingency has fallen out one way, enter into conſideration of that value? If indeed there was any degree of fraud or impoſition, the court would come at it and ſet it aſide: but there is none. The plaintiff was in the beſt ſituation to know the value, not being at a diſtance from the eſtate or from the tenant for life and his family. Looking on the event, it was purchaſed at an under value: but had he lived longer and had children, it had been different. It is aſked, where is the harm, becauſe defendant will have his money again? but I cannot ſet it aſide without making him pay coſts; and that argument might be made uſe of on every advantageous purchaſe, that he might have his principal and intereſt again. Some weight is to be laid on the behaviour of the plaintiff, who ſeemed ſatisfied, and did not complain of it until after death of tenant for life without iſſue; which if it had not been the caſe, I never ſhould have had this ſuit; and yet there would be juſt the ſame ground, if the tenant for life was ſtill living. Theſe kind of purchaſes are a ſort of chance: it is too hard to come at it, unleſs there was any proof of fraud or impoſition, which then the court would lay hold of. Let the bill be diſmiſſed, but not with coſts; the defendant has already a very good bargain.

Rattray

Caſe 140. Rattray *verſus* Darlay, *July* 11, 1752.

Account, immediately directed, tho' by the contract payment poſtponed until death; as on covenant to leave by will ſo much, &c.

THE defendant lived with a woman thirteen years as man and wife, and had ſeveral children by her; ſhe afterward married the plaintiff, they brought a bill to oblige defendant to account for the rents and profits of an eſtate belonging to her, which he had received during the cohabitation. Defendant brought a croſs bill for account of the money expended by her, and ſetting up an agreement in writing by which he was to leave her by his will ſo much, as he received of the rents and profits of her eſtate, deducting thereout what ſhe ſtood indebted to him.

It was urged, that defendant ſhould be obliged to give ſecurity, that he would make that proviſion.

Againſt which was cited a caſe, of a huſband, who by marriage agreement covenanted to leave a particular ſum by will to his wife: but having been extravagant, and being old, and others getting about him, the truſtees in the ſettlement brought a bill to have that ſum ſecured: the court would not alter the agreement or ſecurity, on which the parties relied; it was to be done by his will, and though ſome circumſtances aroſe why it ſhould be reaſonable to vary therefrom, yet the court would not do it. So here the court will not alter the nature of it, and make this contract to leave by will an immediate demand or obligation to give ſecurity to do ſo, to make that a debt on his eſtate now, which he voluntarily agreed to do by will.

LORD CHANCELLOR.

The original bill is by a woman, whom, as there is no proof before the court of her being bad before, the court muſt take to have been modeſt until ſeduced by defendant: though there is ſaid to be proof of her having lived with others before, but none that can be read, becauſe not put in iſſue. There is no neceſſity to put every fact of miſbehaviour in iſſue. Some general charges of that kind will do; which is the rule. This is a cauſe of great imputation and reproach on both parties, eſpecially on the defendant, who has brought a croſs bill for an account in general of all the money expended in houſekeeping, *&c.* during this long cohabitation. Though it mentions the agreement, yet it is upon the ſenſe and conſtruction, the defendant himſelf puts on it. It is like the common caſe on marriage-agreements, where a father on marriage of his daughter gives a ſum of money with her, and covenants by will

will to give ſo much more: that is an agreement; and creates a debt on his eſtate; whether he leaves it by will or no: in what order and priority of payment is of a different conſideration. This is a contract to leave by his will, what ſhould be the amount, of what he received of her eſtate, deducting thereout only what ſhe was indebted for. Suppoſe, by marriage-contract huſband agreed to leave his wife at his death ſo much, as ſhould be the amount of her fortune, which was an uncertain thing: upon a bill by the *prochein amy* of the wife to have this directed accordingly, the court muſt direct the account to be taken in life of the party, though the money was not to be paid until after his death: for otherwiſe it would be impoſſible to have the account taken: ſo that there are ſeveral caſes, wherein an immediate account muſt be taken notwithſtanding by the contract of the parties the payment muſt be poſtponed. This is a contract to leave ſo much; and if you conſtrue it to be a voluntary bounty or legacy, I will ſet it aſide for fraud.

The croſs bill diſmiſſed with coſts: and defendant to pay coſts on the original bill to this time.

Attorney General *verſus* Brereton. Caſe 141.

Brereton *verſus* Tamberlaine, *July* 14, 1752.

Charities. A perpetual curacy or chapel from having parochial rights and privileges, and the inhabitants right to ſervice, baptiſm, &c. and the curate's rights and dues, as ſmall tithes and ſurplice fees.

THIS cauſe came before the court on two bills. Firſt an information at the relation of *Tamberlaine* to eſtabliſh his right to the chapel of *Flint* as curate there; to have an account of profits of that curacy for his own benefit; and to have poſſeſſion of the chapel delivered to him for performance of divine ſervice. The croſs bill was by *Brereton* as vicar of the pariſh of *Northop*, to which this chapelry was ſaid to be annexed, to eſtabliſh his right and for account of the profits belonging thereto, and that he might have poſſeſſion delivered to him for performance of divine ſervice.

Three queſtions were made. Firſt what was the nature and ſpecies of this chapelry of *Flint*? Secondly in whom the right of nomination of the curate or chaplain is; whether in the defendant the biſhop of *St. Aſaph* for the time being as ordinary; or in the rector, who was a *ſinecure* rector (which was now this biſhop by annexation under the *Stat.* 12 *Anne*;) or in the vicar? Thirdly whether the rector or vicar, or whoever has the right of nomination, has the right of amotion of the curate or chaplain at his will and pleaſure?

LORD CHANCELLOR.

Bill lies in name of chaplain or curate to eſtabliſh his right: but not an information in name of Attorney General, unleſs for charities, as augmentations of vicarages are.

Before I conſider the queſtions upon the merits, I will conſider two objections; the firſt of which occurred to me during the courſe of the cauſe, and weighed ſomewhat with me: that this is an original information to eſtabliſh this right as a perpetual curacy. Now I do not know, that it belongs to the juriſdiction of this court to determine all ſorts of eccleſiaſtical rights of this kind, though it does belong to it to eſtabliſh rights of nomination or election at large to a chapelry and curacy; and there have been ſeveral inſtances of it; ſome of late in the *North:* but that has been by bill by the curate or chaplain in his own name, or by the perſon claiming that right: but this is an information in the name of the *Attorney General*; which can be only for a charity; and therefore I doubted at the opening of the cauſe, whether it could proceed in that manner. But I am ſatisfied as to that by looking into the act of parliament 29 *C.* 2. *cap.* 8. relating to augmentations of vicarages. Theſe augmentations are charities to be ſure: but at the latter end of that ſtatute is a clauſe, which conſiders them as charities within the intent of the *ſtat.* 43 *Eliz.* This is not indeed a proceeding by way of commiſſion of charitable uſe, (which commiſſion is founded on that ſtatute) but is by the old way of proceeding in name of the *Attorney General* in this court for the charity: but that proceeding is not confined to caſes conſidered as charities before the ſtatute of charitable uſes, but all others are taken to be within the extenſiveneſs of this proceeding in name of the *Attorney General:* which remedy may be applied here. Theſe augmentations may therefore be conſidered as charities; and proper to come into this court to eſtabliſh as ſuch; which is an anſwer to that difficulty.

On information for charity, tho' the title miſtaken, if a title appears, it muſt be eſtabliſhed.

Another preliminary objection (and which was mentioned at the bar) is, that the relator founds his caſe on a right of nomination in the rector or biſhop, who is united with the rectory; and the defendants ſay, if the relator has any right, it is on the nomination of the vicar, and that he himſelf has been ſo nominated; and then, though a right appears in him, he muſt recover according to the right, he has made; for he muſt recover both *ſecundum allegata et probata.* This I am of opinion would be ſo, if this had been a bill in his own name; for then I could never make a decree to eſtabliſh a right appearing in him contrary to that ſet up. But this being an information in name of the *Attorney General* is an anſwer to that alſo; for though ſuch an information to eſtabliſh a charity is miſtaken in the circumſtance of laying it, yet if it appears, there is a charity, and the right appears in the whole cauſe, that information cannot be diſmiſſed, but a decree muſt be made to eſtabliſh that charity. That doctrine has been frequently laid down in this court and allowed; becauſe it is conſidered as a proceeding by an officer of

of the crown; and as the King is *pater patriæ*, the information therefore muſt not be diſmiſſed: ſo that though the relator has miſtaken his title, but however in the cauſe a title comes out for him and his ſucceſſors, he muſt have that title eſtabliſhed.

This brings it to the three queſtions properly made at the bar on the merits: but they will be reduced to two, for the third muſt follow the determination of the firſt.

As to which queſtion, whether this is of the nature of a perpetual curacy or chapelry, or whether temporary only at the nomination of the vicar and amoveable at his will and pleaſure like a common curate, I am of opinion upon the evidence before me and on the beſt conſideration, that this is a perpetual curacy or chapel. To determine whether it is ſo or no, conſider it firſt as to the rights and privileges appearing to belong to the chapel itſelf: next as to the right of the inhabitants within this diſtrict: thirdly as to the rights and dues belonging to the curate of this chapelry. If all theſe rights concur to ſhew the nature of a perpetual curacy, that muſt determine it.

As to the firſt conſideration it appears, this is a chapel belonging to a county-town. It has belonging to it all ſorts of parochial rights, as clerk, wardens, *&c.* all rights of performing divine ſervice, baptiſm, ſepulture, *&c.* which is very ſtrong evidence of itſelf, that this is not barely a chapel of eaſe to the pariſh, to which it belongs, but ſtands on its own foundation; *capella parochialis*, as it is called in *Hob.* and this differs it greatly from the chapels in *London*, which are barely chapels of eaſe commencing within time of memory, which have not baptiſm or ſepulture; all which ſort of rights belong to the mother-church; and the rector or vicar of the pariſh, who has the cure of ſouls, has the nomination; as the rector of *St. James's* or *St. Martin's* has; but they have no parochial rights, which clearly belong to this chapel. Nor have any of the inhabitants of this chapelry a right to bury in the pariſh-church of *Northop*; and that right of ſepulture is the moſt ſtrong circumſtance; as appears from *Selden's Hiſt. Tithes*, 3 *Vols. fol. Column* 1212. to ſhew, that it differs not from a pariſh-church.

Chapels of eaſe have not parochial rights; are merely *ad libitum*.

The next circumſtance to determine this queſtion is the right of the inhabitants, *viz.* to have ſervice performed there, and baptiſm, and chriſtening, and having no right to reſort to the pariſh-church of *Northop* for theſe purpoſes, nor to any other place if not here: nor are they or have they been rateable to the pariſh-church of *Northop*. It was determined in the caſe of *Caſtle Birmidge*, *Hob.* 66. that the having a chapel of eaſe will not exempt the inhabitants within that diſtrict from contributing to repairs of the mother-church, unleſs

unleſs it was by preſcription; which would be then a ſtrong foundation, that it muſt be conſidered as a perpetual curacy or chapelry.

Augmentations of vicarages continued for ever by St. 29 C. 2.

Next as to the rights and dues of the curate. All theſe concur to ſhew it to be a perpetual curacy, and not at all at the will and pleaſure of the vicar; for the curate has always enjoyed the ſmall tithes and ſurplice-fees: nor is there any evidence to ſhew, that the vicar has received the ſmall tithes. Beſide here is an augmentation made by Mr. *Stone* the *finecure* rector in 1674. of 30*l.* *per ann.* to be divided between the vicar and curate, as the biſhop ſhould think fit. Biſhop *Barrow* in 1676. decreed 10*l.* to the vicar for ever, and 20*l.* to the curate for ever: this was reſerved on a leaſe for twenty-one years, at the end of which then it determined. Nor is it ſhewn, that any new leaſe was made with new reſervations: yet it has been paid ever ſince conſtantly: and that muſt be on the ſtatute 29 *C.* 2. *c.* 8. which provides, that theſe augmentations ſhould continue for ever, and that notwithſtanding there is no reſervation *de novo* on a new leaſe. It was then apprehended to be within that ſtatute: which could be only on the foundation of its being a perpetual curacy: it would be otherwiſe abſurd and ridiculous if amoveable at the will of the rector or vicar, and contrary to the intent of the donor and biſhop, whoſe diviſions and directions would then ſignify nothing.

On union of pariſhes one, is frequently the pariſh church, the leſs as a parochial chapel, not as a chapel of eaſe.

Next as to what ariſes rather from preſumption and conjecture, I am of opinion upon the reſult of the whole evidence, that this was once a diſtinct pariſh, and afterward united to the pariſh of *Northop* on certain terms, though the memory of it and the inſtrument is loſt. Since that time *Flint* has been conſidered as a parochial chapel, to which theſe old rights have been attendant. There are ſeveral inſtances of that kind in this kingdom, of an union of pariſhes, where one is conſidered as the pariſh-church, the leſs is kept up as a parochial chapel for convenience of the inhabitants, and after that the preſentation has been to the principal *cum capella annexa*. *Savil* 17. and theſe parochial rights are evidence of this; it might be the terms of the union, and will amount to a compoſition; and ſo it might grow up: and this ſupports all the evidence, and accounts for the whole: the expreſſion *cum capella annexa* (as the preſentation to *Northop* has been) ſuppoſes that; for there is no ſuch thing as a preſentation to a pariſh-church *cum capella annexa* in *London*, where there are chapels of eaſe within time of memory; which are of no conſideration in law, but merely voluntary and *ad libitum*, and gain no right: but this expreſſion imports a foundation of a chapel, and that with ſuch rights.

As to the next queſtion, I am of opinion, that the right of nomination of the curate to this chapel is in the vicar. As to the biſhop's right he ſubmits the whole to the court; nor is there any proof of a nomination by the biſhop; and it was more natural, that on the union it ſhould be in the vicar, who, (as it was by that union conſtituted) had the general cure of ſouls, than in the rector. The only colour to ſay, it was in the rector was, that the only act appearing in writing was the biſhop's licence to preach. That is only the ordinary act of dioceſan: but there is conſiderable evidence as to a nomination by the vicar. It is objected, that here is no nomination in writing, and therefore though there is by parol, it is evidence of a voluntary temporary curate at the will and pleaſure of the vicar; for that a nomination to a perpetual curacy ought to be in writing. Moſt regularly it ought: but I do not know, it has been determined, that that is neceſſary. A preſentation to a church need not be in writing, but may be by parol. 1 *Sid.* 426. *Co. Lit.* 120. If ſo, I do not ſee, why a nomination to a perpetual curacy may not be by parol; and the uſage in the pariſh is very ſtrong, that it is in the vicar.

Preſentation to a church, or nomination to perpetual curacy, may be by parol.

The third queſtion depends on the firſt; for if this is a perpetual curacy, it conveys an intereſt for life unleſs deprived by the ordinary in proper courſe of law; and then it is a contradiction in terms to ſay, that a perpetual curacy is removeable at will and pleaſure. Here is indeed one inſtance of it; but that was an act of power, and it would be abſolutely inconſiſtent with this charity, which I have now eſtabliſhed by this decree; for if the vicar did remove, I am of opinion, this 20*l. per ann.* would be rather loſt than go to the vicar. Though the collations by the biſhop are *cum capella de Flint annexa*, that confers no more to the vicar than the right of nomination to the curacy. That might be part of the terms of the union; of which, I think, there is a violent preſumption. I am the more induced to be of this opinion from the reaſon and utility of the thing, and as anſwering the purpoſe of ſuch foundation; which was, that there ſhould be a reſident miniſter at *Flint*: whereas if I ſhould hold, that the vicar of *Northop* might take this into his own hands, and perform divine ſervice there, the conſequence would be, that *Flint*, which is a corporate and county town, and ſo taken notice of by the donor and the biſhop, would be ſerved only occaſionally by the vicar of *Northop* preaching and reading prayers on *Sunday*; which is not half the duty of a miniſter.

Nov 15.

Perpetual curacy not removeable at will.

Ld Gibs. 819. Burn, Eccl. Law 2. ed. v. 2. p. 65.

I ſhall therefore determine accordingly, unleſs either ſide deſire to try it at law.

Which was declined.

Caſe 142. Trevanion *verſus* Vivian, *July* 14, 1752.

Maſter of the Rolls for Lord Chancellor.

Deviſe of reſidue of perſonal to A. if he attain twenty one, means the profits to accumulate.

A Deviſe was made of the reſidue of perſonal eſtate if the party ſhould attain twenty-one.

That the profits in mean time are given, and ſhould accumulate, were cited two caſes: firſt *Green* v. *Ekins*, 6 *Dec.* 1742. where the reſidue of perſonal eſtate was given to ſuch ſon of his daughter, as ſhould attain twenty-one. *Lord Chancellor* held, the profits in mean time were not undiſpoſed of, but ſhould accumulate. Next *Butler* v. *Butler*, 22 *June* 1744. where a reſidue deviſed to *A.* if he ſhould attain twenty-one; if he ſhould not attain twenty-one, then over: *Lord Chancellor* would not ſuffer it to be argued, as having determined it before, that they ſhould accumulate and make part of the reſidue. So here it makes part of that reſidue, not like an executory deviſe of land, which plainly deſcends to heir at law in mean time.

Caſe 143. Hele *verſus* Gilbert, *July* 16, 1752.

At the Rolls.

Deviſe of arrears of intereſt: arrears of annuity paſs.

DEVISE of "all my arrears of rent and intereſt due at my "death."

Teſtator had at his death no arrears of rent, having collected it all in money, but had arrears of an annuity.

His Honour held, that though theſe clearly could not paſs under arrears of rent, yet they might properly within teſtator's intent under arrears of intereſt, eſpecially as in another part of his will he called this annuity his eſtate; which ſhewed, he conſidered it as ſuch.

On deviſe of "all my eſtate" arrears of an eſtate due at his "death will be aſſets in hands of executors, only the rents accruing afterward paſſing thereby.

China paſs under furniture: unleſs on deviſe by ſhopkeeper.

Another queſtion was, whether ſome *China* would paſs by the word *furniture*.

Held, they would, this not being the caſe of a ſhopkeeper, as a brafier, *&c.* who if he makes ſuch a deviſe under the general

word

word *furniture* only the goods of his trade will be conſtrued to paſs; as determined by the houſe of *Lords*, where the decree in *Chancery* was reverſed.

Lewis *verſus* Nangle, *July*, 17, 1752. Caſe 144.

BILL by a deviſee to redeem: but heir at law not made a party.

Heir need not be party to bill by deviſee to redeem.

LORD CHANCELLOR.

Every deviſee of a mortgaged eſtate, that brings a bill to redeem, need not make heir at law party. If the plaintiff claims to have the will eſtabliſhed, it is neceſſary: if only a title under the will, it is not.

Ward *verſus* Turner, *July* 20, 1752. Caſe 145.

THE end of the bill was to have a transfer of 600*l.* new *South Sea* annuities made to the plaintiff as executor of *John Moſely*, and to have certain ſpecifick parts of the perſonal eſtate of *William Fly*, dead inteſtate, delivered or made over to the plaintiff. Another prayer of the bill was to have an account of what was due to *Moſely* for ſervices performed to *Fly*, againſt whoſe eſtate this demand was made.

Delivery neceſſary to donation *mortis cauſa*; and delivery of receipts for South ſea annuities not ſufficient, tho' ſtrong evidence of the intent.

The caſe, the plaintiff made, was this; he was executor of *Moſely*, who was related to *Fly* by affinity, having married his aunt; that *Fly* had great obligations to *Moſely*, who took care of him in his infancy; and at his houſe *Fly* uſed to come from ſchool, when it broke up: that afterward *Moſely*, who in the latter part of his life appeared to be in very mean circumſtances, lived with *Fly* as his ſervant until *Fly*'s death; had his victuals there; performed ſervices to him; and had now and then a ſhilling given him: that from hence *Fly* made profeſſion of a ſtrong intent to do for him at his death, and had great kindneſs for him; in purſuance of which, as *Fly* drew near his end, being in a very bad ſtate of health, during that time he made *Moſely* ſeveral donations *mortis cauſa* in proſpect of death. Four times were fixed on by the witneſſes, of which ſeveral were examined in the cauſe, ſpeaking of actual gifts and declarations ſupporting them. Firſt 18*th January* 1746, which was ſpoken to by the porter of *Furnival's Inn*. The ſecond 6*th February* 1746, which was the principal proof relied on by the plaintiff to ſupport the gift of theſe annuities, and was proved by *Fly*'s barber; who being ſent for by *Fly* found *Moſely* with him,

him, and no other; and ſwore to the particular words uſed, and declarations made, that *Fly* ſaid to him; *viz.* "I intended to give "him (ſpeaking of *Moſely*) *Longford* eſtate for his life: but I have "conſidered of it; and that which is worth 40*l.* a year to another, "is not worth ſo much to him; for if the tenants wanted an "abatement for repairs, he would allow it; and therefore I will do "better for him." That thereupon *Fly* went to his eſcritoir, and taking three papers ſaid, "I give you *Moſely* theſe papers, which "are receipts for *South Sea* annuities, and will ſerve you, after I "am dead." The third *23d February*, which was proved by one, who ſwore, that in his preſence *Fly* ſaid, "*Moſely* I give you all the "goods and plate in this houſe." Fourthly *3d March* by the ſaid barber, who ſwore, that *Fly* declared to him and to another perſon, who only were preſent, that he gave to *Moſely* all his houſhold goods, money, arrears of rent, and every thing that ſhould be found in his houſe except his ſword, gun, and books; and that this together with thoſe three receipts would make 2000*l.* that he wiſhed a gentleman of his acquaintance had that ſword and gun, but all the reſt he gave to *Moſely*. He died in *April* following.

Theſe were argued to be ſo many declarations of bounty ſupported by ſo many witneſſes at different times. Two queſtions aroſe, Firſt whether in fact theſe things were given? Secondly whether properly given in point of law? Donations *mortis cauſa* are derived from the civil law. *Juſtinian's Inſt. lib.* 2. *tit.* 7. ſhews the nature of them; and that in general any thing is properly the ſubject matter of ſuch donations, that may be the ſubject matter of a legacy or donation *inter vivos*. Either rights in poſſeſſion or reverſion are capable of being ſo given. It is not neceſſary, that donor ſhould have a legal intereſt; an equitable will do, when by no act he can paſs the legal property: conſequently the formalities accompanying ſuch donation muſt be according to the ſubject of the gift. Livery then cannot be always neceſſary; as in a choſe in action or ſimple contract-debt, which lye not in livery, choſes in action were not aſſignable: but now are in this court as much as things in poſſeſſion by the rules of law: and therefore this court will carry into execution a voluntary gift of a choſe in action. In *Lawſon* v. *Lawſon*, 1 *Will.* 441. ſuch a gift of a note drawn on a goldſmith, which in point of law paſſed nothing, was held good. *Jones* v. *Selby*. *Pre. Chan.* 300. *Gold* v. *Rutland*, *Eq. Ab.* 347. In *Baily* v. *Snelgrove*, 11 *March* 1744, Mrs *Baily*, going out of town in a bad ſtate of health, gave her maid a bond executed to her by a third perſon; ſaying if *I dye*, *it is yours*. She died inteſtate; the plaintiff was her adminiſtrator: thus it ſtood on defendant's anſwer. A bill being brought for diſcovery and delivery of effects of the inteſtate in hands of defendant, the queſtion was, whether the nature of the property was capable of being ſo given? *His Lordſhip* held, it might

might as well as a ſpecifick chattel: though no legal property paſſed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt not the paper, the court held it a good donation *mortis cauſa*, comparing it to the property which paſſes by aſſignment of a bond, which paſſes nothing in point of law, and the aſſignee muſt make uſe of the other's name for recovering on it. That caſe reſted ſingly on the averment in the anſwer: in this is ſtrong evidence. The court there put this caſe; that if a chattel in poſſeſſion had been bought by the inteſtate, and a bill of ſale made to a truſtee for her uſe, the property would have been in the truſtee, and the equitable intereſt in the *ceſtuy que truſt*, who if ſhe had given this chattel ſo circumſtanced to the defendant, it would have been good.

LORD CHANCELLOR.

That is a caſe put upon an equitable intereſt. There the chattel itſelf muſt have been delivered.

For plaintiff. Though theſe donations differ in ſome reſpects from teſtamentary diſpoſitions, yet they participate in a great degree; for like that it is a declaration of his mind, what he will have done with his property, when he is no more; he does not part with the property or even the uſe of the thing in his life; for that would prevent any ſuch diſpoſition from being ever made. Where the thing lies in livery, the livery is not made to compleat, it is only evidence of the gift: and if the moment after poſſeſſion delivered (with a declaration that he intended, if he died, it ſhould be the donee's abſolutely) the thing was reſtored by donee, that would not tend to defeat the gift.

LORD CHANCELLOR.

I apprehend, it would; and that ſuch an inſtantaneous gift and taking back would not do, which it would be dangerous to admit.

For plaintiff. But where livery cannot be, the beſt evidence the nature will admit, being only to ſhew the mind of donor, will do. Here is ſuch a delivery over, as is ſufficient evidence of the gift of theſe annuities. They certainly lie not in livery, there being other ways of paſſing them. There is no evidence of them but one's name being placed in the book. The delivery then with ſtrong words of gift of theſe receipts, which were the only ſymbol of his property, was as much, as he could poſſibly do toward giving it, except a mere tranſfer in the books, which was not neceſſary, nor could he conveniently do that; and it was giving with a proſpect of not recovering of that particular illneſs; for that of itſelf would be a revocation: but he died of it, and within two months

of the gift. In cases of livery of ſeiſin it is not neceſſary to deliver the thing itſelf or any part; for coming upon the land, and delivering a gold ring thereon, is enough, 1 *Inſt.* 44. though not participating of land: but there ought to be clear proof of the intent, which there is here. Next as to the ſpecifick things it is ſaid, there was not ſufficient poſſeſſion delivered: but in ſuch a number of things it is not neceſſary, every one ſhould be delivered. The ſubject of the gift is, what was then in the houſe. If a delivery is abſolutely neceſſary, the plaintiff has not indeed proved it: but *Moſely* was actually in the houſe with him; and is then as much in poſſeſſion, as if actually delivered to him; which is not neceſſary if he is in poſſeſſion. If one is recited to be in poſſeſſion of a houſe, livery is not neceſſary. If one does as much, as he can, toward poſſeſſion, it is all that is required; as delivery of the key of a warehouſe; ſo of a piece of parchment, delivery of a ſhip and of the actual poſſeſſion of it to the mortgagee, as determined by *Your Lordſhip* in *Brown* v. *Williams*. No more could be done here; for he could not carry the goods out of the houſe; and he was then in poſſeſſion. However, as this is a bill for diſcovery of aſſets, if plaintiff is not intitled to theſe gifts, he is at leaſt to a reaſonable ſatisfaction for his ſervices.

On the part of the defendant, adminiſtrator of *Fly*, there was no evidence to impeach the evidence of the gift, but to invalidate it to a certain degree, principally from the behaviour of *Moſely* after death of *Fly*, as not like one who thought, he had a right to theſe donations from him; for it was ſworn, that being at the houſe of *Fly* at his death, he continued there until *Midſummer*; he did not ſay, theſe goods were his own upon application made to buy them, but that they were *Turner*'s the adminiſtrator and next of kin; ſent to *Turner*, deſiring him to take them away; that they were ſent away, and *Moſely* aſſiſted in packing them up, and declared, he would not go into mourning, for that *Fly* had given him nothing, that he could help. A donation *mortis cauſa*, (though there is indeed ſuch a thing in the law) is of a very delicate nature, and from its import merely voluntary.

LORD CHANCELLOR.

Such donations are ſubject to debts.

For Defendant. If there is no diſtinction between teſtamentary diſpoſitions and ſuch a donation, and there is a former will, the ſtatute of frauds will be overturned, which relates to all wills of perſonal eſtate: therefore ſince the ſtatute, no nuncupative will or codicil can be ſet up, where a will was made before.

before. The ſtatute has expreſſed an anxiety as to nuncupative wills, not taking them away abſolutely for fear of breaking in upon the real intent, but, ſeeing them liable to uncertainty, litigation, and perjury, has put ſeveral reſtrictions on them: whereas if the ſaid diſtinction is not obſerved, a nuncupative will may take place, proved at any time, and that by a ſingle witneſs, where more than one would not be ventured for fear of contradiction, and that at any diſtance of time, nor confined to 30*l.* as the ſtatute required. A teſtamentary diſpoſition is a gift in caſe of, and only has operation after death. A donation then cannot be in general in caſe of death; but muſt have ſomething peculiar differing from legacies. The characteriſtick of it is this, It is not on a general apprehenſion of approaching mortality, but where the particular recovery of the donor is annexed by way of defeaſance to the gift, which would be otherwiſe abſolute. It may be confined to an immediate illneſs; but the *Roman* law puts the caſe of a man's going a journey, which was formerly more hazardous than now: ſo if going to battle, and in caſe he is killed, and makes that gift: ſo if under bad ſtate of health he makes a compleat gift, if he does not recover: that muſt mean ſome circumſcribed time or illneſs, and there muſt be ſome ſort of defeaſance ariſing from the recovery or return home to theſe donations; otherwiſe it is an abſolute gift. But though liable to be defeaſanced, it muſt be a compleat gift before *inter vivos*; and that is the reaſon, the Eccleſiaſtical Court has no probate or juriſdiction over it, as it would if teſtamentary. Next to conſider what is meant by delivery in the *Roman* and civil law-books, as far as admitted in this country; for as it is in all thoſe books, it will not hold here. Where delivery is neceſſary to make that compleat *inter vivos*, if a man ſaid, I give it, and there is no delivery, it would be *nudum pactum*, there could be no title or action. Then delivery is there put only to ſhew, that the gift muſt be compleat. In that new ſpecies of property the actual delivery is ſupplied by that, which is equivalent to delivery; as in caſe of a ſhip delivered by bill of ſale, which is defeaſanced in caſe of recovery; that is enough: but it muſt be compleat according to the nature of the thing, otherwiſe it cannot be diſtinguiſhed from a legacy. A delivery is neceſſary according to *Swinb.* in each of three inſtances, he puts, of a donation *mortis cauſa*. *Lawſon* v. *Lawſon* turned upon it, and could not be admitted but on that foundation. There cannot indeed be ſuch a donation by parol of a book or ſimple contract debt, or of arrears of rent; becauſe there can be no delivery; and no inconvenience, becauſe it may be eaſily done another way. Taking it in caſe of a ſpecifick thing, as a horſe, &c. poſſeſſion is altered, (as *Swinb.* ſuppoſes) and then donee ſhall enjoy it: otherwiſe no difference between this and a teſta-

mentary

mentary diſpoſition. This donation therefore takes effect: but ſtill liable to that contingency. There is no caſe that donor muſt keep poſſeſſion in his life; how then can he have the uſe or benefit of it, taking it to be a ſpecifick thing? As to a *choſe in action* being allowed to be given, that was a new caſe before *Your Lordſhip*; for *Baily* v. *Snelgrove*, which was of a bond, was the firſt ever determined upon any thing of a *choſe in action*. The reaſon, the court went on there, was, that it was as compleat a gift, as could be made of a bond; for writing not being neceſſary to aſſignment of a bond, if all was delivered that could be, all that was required, was done. It was a ſubſtantial gift of the paper and ſeal, without which there could be no recovery on it. A bond carries the debt itſelf, not only evidence or ſecurity of it; therefore is conſidered as *bona notabilia*, and not only where the party dies, like other choſes in action; and a Court of Equity does not ſay, a bond muſt be delivered by deed in writing. In *Richards* v. *Syms* on gift of a mortgage to mortgagor by giving him the deeds *Your Lordſhip* held, that if that fact was proved, it was a gift of all the money on the ſecurities, and not within the ſtatute of frauds. So that the bond there is as compleatly given, as can be, ſuppoſing that parol evidence is ſufficient, and writing not neceſſary. If that was not the ground of that determination, and no delivery requiſite, but that it is to remain with donor until his death, and only a formal delivery, it will not differ from the inconveniencies intended to be guarded againſt by the *ſtat.* of frauds; for then every looſe declaration will be ſet up notwithſtanding ſolemn wills before executed. It is dangerous to ſupport parol declarations upon gifts of this kind, not accompanied with a viſible act to give notice to all the world, as delivery: and the ſtatute has thought it better, that ſome of theſe true gifts ſhould fail, (as has frequently happened for want of the ſolemnities thereby required,) than that there ſhould be a publick inconvenience. If a common choſe in action cannot be delivered, how can this? which is ſtronger, as it is capable of being aſſigned by a proper transfer. If indeed one goes as far as he can, the court will perhaps ſupply it; as in thoſe caſes on the ſtat. *7.* 1. in *Ryal* v. *Rowles*, but that not the caſe here. *Fly* was a man of buſineſs, an attorney; yet waits near two months without doing that, which would effectuate it. That argument, of the teſtator's having time to make a perfect gift, is often uſed in *Doctors Commons* on imperfect wills. This court will never ſupport that as a donation, which may be a gift by will; for there muſt be a difference between them.

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Lord Chancellor in the outſet laid the other goods out of the caſe, of which there was no pretence of any delivery; which would be very dangerous; and that it was impoſſible to make

ſuch a complex donation *mortis cauſa* as a general bequeſt of all one's perſonal eſtate or of a reſidue without ſome proof of delivery; for that would be the ſame as a nuncupative will: and it was a pity, the ſtat. of frauds did not ſet aſide all theſe kinds of gifts. But what weighed with him, was, whether the ſtock without delivery was a good donation *mortis cauſa*: which queſtion conſidering the vaſt proportion of property in ſuch funds was of infinitely greater conſequence than the value of it: therefore he ſhould not determine it haſtily. If courts of juſtice were compellable by rules of law to ſuffer ſuch gifts without any transfer to prevail, it could not be helped; but then the ſtat. of frauds relative to nuncupative wills would be ſo far nugatory and vain.

Having taken time to conſider, *His Lordſhip* now delivered his opinion.

There are two general queſtions. What is the weight and ſtrength of the evidence in point of fact? Next the reſult of that evidence in point of law, or the law ariſing on this fact?

As to the firſt, and as to the conviction ariſing therefrom, there is to be ſure very ſtrong evidence on the part of the plaintiff of *Fly*'s general intention of bounty, which is not to be diſputed: but as to the evidence of the particular gifts I cannot help taking notice, that the declarations relied on by the plaintiff to prove them are all made to perſons of extreme low degree, his porter, barber, &c. It is obſervable alſo, that *Fly* was bred an attorney; had ſome property, ſome real eſtate, was a man of buſineſs; and muſt be preſumed from his profeſſion and education, to know ſomething of what the law required to make a will; and certainly it would be more eaſy for him to have made a will in writing than to have taken all theſe ſeveral ſteps to give away theſe parts of his eſtate. It is likewiſe obſervable, that the behaviour of *Moſely*, and his declarations after the death of *Fly*, are ſome impeachment and weakening of the plaintiff's evidence; for it is extraordinary, that, if he thought himſelf intitled, he ſhould not inſiſt upon theſe goods being his own inſtead of ſuffering them to be taken away and aſſiſting therein. At the ſame time if I was to ground my opinion upon any objection to the evidence in point of fact, I ſhould not determine it, but ſend it to be tried; for this is as proper a caſe to be tried as any other. It is not inſiſted upon by the plaintiff as a teſtamentary cauſe; for if he was to inſiſt on that, it would overturn his demand, as he has no *probate*: but it is inſiſted on as a donation *mortis cauſa*. *Trover* might be brought for it; for it would transfer the property: but though I have ſearched for it, I do not find a caſe of that kind in the books, of ſuch an action at law: but it might be tried at

law, was there a foundation for it; and if I was to ground my opinion upon the evidence in point of fact, I would direct a trial. But according to my opinion there is no reaſon to give the parties that trouble; for next, ſuppoſing the fact well proved, the conſideration is the reſult in point of law.

The relief ſought is founded upon theſe gifts being good donations *mortis cauſa*.

Firſt as to any ſpecifick parts (if they may be ſo called) except the annuities. They are clearly not good (as I declared at the hearing) there being no pretence of any delivery in any ſhape whatever. They are ſo general, as in my opinion if they prove any thing, prove an intent to make a nuncupative will of all his perſonal eſtate (this is excluſive of the annuities) ſaying, *Moſely* I give you all the plate and goods in this houſe, or, if I die, all are yours: but nothing was delivered. It is ſaid, he had poſſeſſion by living in the houſe, and did not want delivery; but he lived as a ſervant, who had no poſſeſſion: ſo that if a ſervant had them in cuſtody, it would be a poſſeſſion for his maſter. The other declarations are not only of the goods, but of all money and arrears of rent, and to extend almoſt to every thing: conſequently there is no ground to carry it ſo far; and it is impoſſible to ſupport any of theſe as gifts in proſpect of death, as I have declared already.

Next as to the gift of this annuity. If the witneſſes deſerve credit, it is ſtrong evidence of a general intent of bounty: but it rather turns againſt the plaintiff for it ſhews a general intent to give the whole to *Moſely* by making a nuncupative will or wills at different times. If that was to be admitted to ſupport theſe ſeveral gifts as ſo many donations *mortis cauſa*, it would overturn not only the letter but the whole ſpirit and intent of the ſtat. of frauds. But notwithſtanding, ſuppoſe this gift of the annuities was juſt, as if it was a diſtinct and independent donation from the other matters inſiſted on as gifts, the queſtion is, whether it is ſuch a gift, as the law of *England* allows as a donation *mortis cauſa?* Firſt, the fact of the gift is proved only by one witneſs: whereas the civil law, from which this doctrine is taken, requires five witneſſes thereto: for *Juſtinian*, when he allowed theſe gifts, was apprehenſive of fraud ariſing from them; and takes notice in that very chapter relied on for the plaintiff, that he had made a conſtitution to regulate it, that it ſhould be in the preſence of five, limited in point of value, *&c.* which ſhews, how jealous he was of it. Beſide the witneſs ſwears to this in very formal words: and though it is pretty hard to object to a witneſs as looſe and uncertain on one hand, and the contrary

contrary on the other, yet this argues either a very ſtrong memory or a pretty ſtrong aſſurance in ſwearing. But the expreſs gift, as he ſwears, is only of the three receipts. That is the form of the gift. Taking it therefore according to the ſubſtance of the gift, that this amounted to a declaration, that *Fly* by giving theſe receipts intended to give the annuities, upon this the principal point ariſes; whether delivery of the thing given by way of donation *mortis cauſa* is neceſſary; and, if neceſſary, whether this delivery of the receipts is ſufficient delivery of the thing given by way of donation *mortis cauſa?* I am of opinion, that delivery is neceſſary to make good ſuch a gift; and that the delivery of theſe receipts for the conſideration-money of the purchaſe of them was no ſufficient delivery to validate this act. To clear this, it is proper to conſider the notion of a donation *mortis cauſa* according to the civil and *Roman* law and the law of *England*. According to the civil and *Roman* law there is great variety, and ſeveral paſſages therein are pretty difficult to reconcile. *Digeſt Lib.* 39. *Tit.* 6. *Law* 38. requires, that both donor and donee ſhould be preſent at the time of the gift, *quo præſens præſenti dat*; which looks, as if delivery was intended at the time. It is *quo* there and in ſeveral editions: but in the *Lyons* edition of *Gothofrædus' Corpus* it is *quod*; which makes it ſenſe. Next in *Digeſt*, ſame *Tit. Parag.* 1. it ſpeaks of it throughout as a reſtoring of the thing, if donor ſhould recover; as if a reſtitution was to be. It is proper to take notice, that in the *Roman* law there were three kinds of donations *mortis cauſa*. And in *Voet* on the *Pandect, Lib.* 39. *Tit.* 6. *Parag.* 3. in his 2*d Vol. Page* 710. the diviſion is agreeable to that made of theſe donations by *Swinb.* The firſt is a donation by one in no preſent danger, but in conſideration of mortality, if he died; and this is ſtrictly compared to a legacy; for the property was to paſs at the death, not at the time. The ſecond kind is, where the property paſſed at the time defeaſible in caſe of an eſcape from that danger in view or of recovery from that illneſs. The third was, where, though he was moved with the danger, yet not thinking it ſo immediate as to veſt the property immediately in the perſon, but put it in poſſeſſion of the perſon as an inchoate gift to take effect, in caſe he ſhould die. *Vinius*'s *Comment* on this place of *Juſtinian* is more particular; puts the remedy by action, donor might have, in caſe he repented or revoked. That is on the laſt kind of donation *mortis cauſa*; where he did not part with the property immediately, he ſhould have a real action: but where he actually parted with the property, but the gift was to be defeated by his revocation, or recovery, or eſcape from that danger he was in, *conditionem habeat*, (which is a perſonal action) to make the irritancy, or to recover damages for the thing: ſo that it differed not but in the nature of the action. And in *Calvin*'s *Lexicon, &c.* that is the diſtinction. *Swinb.* on

Nature of a Donation mortis cauſa.

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the text I have quoted, implies there ſhould be a delivery; ſaying that legacies differ from ſuch donations; for that legacies are not delivered by the teſtator; but to be paid or delivered by the adminiſtrator; putting the diſtinction upon the one being delivered in life, the other after death. But notwithſtanding this, ſeveral books in the civil law import the contrary: particularly *Vinius* in his *Comment Lib.* 2. *Tit.* 7. *Sec.* 1. *Numero* 2. *Cobaruvias* 1 *Vol. Rub.* 3. and *Voet* on the *Pandect*, ſame *Chapter*, *Num.* 3. and *Num.* 6. which paſſages ſhew the different expreſſion and opinions, ſome importing a delivery, others not. I have mentioned them to come at that which ſeems the diſtinction reconciling them all, according to what is laid down by *Voet*, *Numb.* 6. that they did not require an abſolute delivery of poſſeſſion to the firſt or third kind of gift, I have mentioned: but in the other caſe, where the property was to paſs immediately, it was required: which is the meaning of the expreſſion in *Voet*, *in mortis cauſa donatione Dominium non tranſit ſine traditione*, and of othat ther expreſſion in *Voet*. With this diſtinction theſe paſſages in the civil law are properly reconciled. Though I know theſe donations *mortis cauſa* could never come directly in queſtion in the Eccleſiaſtical Court, they might collaterally; and on theſe two heads I enquired, whether there have been any caſes there upon this; *viz.* in ſuits againſt an adminiſtrator on account of aſſets by the next of kin, where the adminiſtrator had inſiſted, he could not adminiſter ſuch a part, becauſe it was given *mortis cauſa*; or if there is a will, in which there are ſpecifick legacies, and one of thoſe legacies he had given in his life by way of donation *mortis cauſa*, there it might come in queſtion in the Eccleſiaſtical Court: but I cannot find it has. The neareſt caſe to it is *Ouſley* v. *Carrol*, *June* 1721, in the *Prerogative Court* before Dr. *Betteſworth*. There was left a writing in preſence of three witneſſes not in the form of a will, but a deed; *viz.* "I have given and granted, and "give and grant, to my five ſiſters and children of the ſixth, their "heirs, executors, and adminiſtrators, in caſe they ſurvive me, "all my goods and chattels, and real and perſonal eſtate, and "all which I may claim in right of my own, whether alive or "dead." The diſpute was by a perſon claiming as his wife, and who had been ſo, but divorced; who inſiſted, this was no will, but deed of gift *mortis cauſa* (and a gift *mortis cauſa* may be made in writing as well as otherwiſe, and ſo it might by the *Roman* and civil law) but the Eccleſiaſtical Judge was of an opinion, this was teſtamentary; proved it as ſuch as a teſtamentary act, and *Probate* was granted; from which there was no appeal; but a caſe was there cited of *Shargold* v. *Shargold* upon deed of gift by Dr. *Pope* not to take place until his death, and ſix-pence delivered by way of ſymbol to put grantee in poſſeſſion: that was pronounced for as a will, not as a donation *mortis cauſa*; which I

mention to ſhew how far the Eccleſiaſtical Court has conſidered theſe things as teſtamentary. Having conſidered theſe donations, the different ſpecies, and how far delivery is neceſſary by the *Roman* and Civil law, I will conſider it according to the law of *England*. They are undoubtedly taken from the civil law; but not to be allowed of here farther, than the civil law on that head has been received and allowed. Taking the law of *England* to conſiſt (as *Hob.* ſays) of rules of law and equity, it might have come in queſtion in caſes of action of *Trover* and *Detinue*: but I have never found any action on that head. Conſider it therefore as in this court; the civil law not binding here but as far as received and allowed; which muſt be from adjudged caſes and authorities, proving that the civil law has been received in *England* in reſpect of ſuch donations only ſo far as attended with delivery, or what the civil law calls *traditio*; for which *Swinb.* who being an *Engliſh* writer on the civil law, what he lays down is ſome evidence of what has been received here, *Part* 1. *Sec.* 7. but in other places, *Sec.* 6. in *Tit. Definition of Legacy*, he is ſtill more expreſs. In both places, in one directly in the other collaterally, he lays down, that delivery is neceſſary. Next conſider it on the reſolutions of this court: the ſame thing reſults from them. There are not many caſes on this head; and they are ſomewhat looſe. The firſt is *Drury* v. *Smith*, 1 *Wil.* 404. where Lord *Cowper* founded himſelf on this and the poſſeſſion tranſmitted and changed: next *Lawſon* v. *Lawſon* 1 *Wil.* 441. All, that I can collect from thence, is, that the purſe was held good, becauſe delivered to the wife herſelf. As to the other legacy of 100*l.* bill, I cannot ſay, on what it depended. It is a kind of compound gift; ſo many collateral circumſtances are taken into it, that nothing can be inferred from it: but, being a draught on his goldſmith, that draught was delivered: ſo that it does not contradict what I lay down; and there was delivery, ſo far as it was capable. In *Jones* v. *Selby*, *Chan. Pre.* 300, the reſult is, that the opinion of the *Maſter of the Rolls* was founded plainly on this of the delivery of poſſeſſion; holding that the gift of the tally, as contained in the hair-trunk, was a good donation *mortis cauſa*; and that Lord *Cowper* avoided determining that on the foundation of the ſubſequent point of a ſatisfaction or ademption, on which he grounded his determination. In all the inſtances it is abſolutely neceſſary to be the perſon's after the party's death: though in ſome caſes it veſts the property, in others not. But to explain more fully Lord *Cowper*'s opinion there, I will refer you back to *Drury* v. *Smith*, and to *Hedges* v. *Hedges*, *Chanc. Pre.* 269. which turned on another point: but there Lord *Cowper* laid down a neceſſity of delivery very ſtrongly, where he ſays, teſtator gives with his own hands. In *Baily* v. *Snelgrove*, determined by me 11 *March* 1744, was urged; where

a bond was given in proſpect of death: the manner of gift was admitted; the bond was delivered; and I held it a good donation *mortis cauſa*. It was argued, that there was no want of actual delivery there or poſſeſſion, the bond being but a *choſe in action*; and therefore there was no delivery but of the paper. If I went too far in that caſe, it is not a reaſon I ſhould go farther; and I chuſe to ſtop there. . But I am of opinion, that decree was right, and differs from this caſe; for though it is true, that a bond, which is ſpecialty, is a *choſe in action*, and its principal value conſiſts in the thing in action, yet ſome property is conveyed by the delivery; for the property is veſted; and to this degree that the law-books ſay, the perſon, to whom this ſpecialty is given, may cancel, burn, and deſtroy it; the conſequence of which is, that it puts it in his power to deſtroy the obligee's power of bringing an action, becauſe no one can bring an action on a bond without a *profert in Cur*. Another thing made it amount to a delivery, that the law allows it a locality; and therefore a bond is *bona notabilia* ſo as to require a prerogative adminiſtration, where a bond is in one dioceſe, and goods in another. Not that this is concluſive: this reaſoning I have gone upon, is agreeable to *Jenk. Cent.* 109, *caſe* 9. relating to delivery to effectuate gifts. How *Jenkins* applied that rule of law he mentions there, I know not; but rather apprehend he applied it to a donation *mortis cauſa*: for if to a donation *inter vivos*, I doubt, he went too far. Another caſe is *Miller* v. *Miller*, 3 *Wil.* 356; which is a very ſtrong caſe, ſo far as that opinion goes, to require delivery; which caſe, I believe, was hinted at as inconſiſtent with my decree: but there is a great difference between delivery of a bond (which is a ſpecialty, is itſelf the foundation of the action, and deſtruction of which deſtroys the demand) and the delivery of a note payable to bearer, which is only evidence of the contract. Therefore from the authority of *Swinb.* and all theſe caſes the conſequence is, that by the civil law, as received and allowed in *England*, and conſequently by the law of *England*, tradition or delivery is neceſſary to make a good donation *mortis cauſa*: which brings it to the queſtion, whether delivery of the three receipts was a ſufficient delivery of the thing given to effectuate the gift. I am of opinion, it was not. It is argued, that though ſome delivery is neceſſary, yet delivery of the thing is not neceſſary, but delivery of any thing by way of ſymbol is ſufficient: but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to ſome gifts, or in the law of *England*, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the caſes in this court delivery of the thing given is relied on, and not in name of the thing; as in the delivery of ſix-pence in *Shargold* v. *Shargold*: if it was allowed any effect, that would have been a gift *mortis cauſa*,

not as a will, but that was allowed as teſtamentary, proved as a will, and ſtood. The only caſe, wherein ſuch a ſymbol ſeems to be held good, is *Jones* v. *Selby*: but I am of opinion, that amounted to the ſame thing as delivery of poſſeſſion of the tally, provided it was in the trunk at the time. Therefore it was rightly compared to the caſes upon 21 *J.* 1. as *Ryal* v. *Rowles* and others. It never was imagined on that ſtatute, that delivery of a mere ſymbol in name of the thing would be ſufficient to take it out of that ſtatute: yet notwithſtanding, delivery of the key of bulky goods, where wines, *&c.* are, has been allowed as delivery of the poſſeſſion, becauſe it is the way of coming at the poſſeſſion, or to make uſe of the thing: and therefore the key is not a ſymbol, which would not do. If ſo then delivery of theſe receipts amounts to ſo much waſte paper; for if one purchaſes ſtock or annuities, what avail are they after acceptance of the ſtock? It is true they are of ſome avail as to the identity of the perſon coming to receive: but after that is over, they are nothing but waſte paper, and are ſeldom taken care of afterward. Suppoſe *Fly* inſtead of delivering over theſe receipts to *Moſely* had delivered over the broker's note, whom he had employed, that had not been a good delivery of the poſſeſſion. There is no colour for it; it is no evidence of the thing, or part of the title to it; for ſuppoſe it had been in a mortgage in queſtion, and a ſeparate receipt had been taken for the mortgage-money, not on the back of the deed, (which was a very common way formerly, and is frequently ſeen in evidence of antient titles) and mortgagee had delivered over this ſeparate receipt for the conſideration-money, that would not have been a good delivery of the poſſeſſion, nor given the mortgage *mortis cauſa* by force of that act. Nor does it appear to me by proof, that poſſeſſion of theſe three receipts continued with *Moſely* from the time, they were given, in *Feb.* to the time of *Fly*'s death; for there is a witneſs, who ſpeaks, that in ſome ſhort time before his death *Fly* ſhewed him theſe receipts, and ſaid, he intended them for his uncle *Moſely*. Therefore I am of opinion, it would be moſt dangerous to allow this donation *mortis cauſa* from parol proof of delivery of ſuch receipts, which are not regarded or taken care of after acceptance; and if theſe annuities are called *choſes in action*, there is leſs reaſon to allow of it in this caſe than in any other *choſe in action*; becauſe ſtocks and annuities are capable of a transfer of the legal property by act of parliament, which might be done eaſily; and if the inteſtate had ſuch an averſion to make a will as ſuppoſed, he might have transferred to *Moſely*: conſequently this is merely legatory, and amounts to a nuncupative will, and contrary to the ſtat. of frauds, and would introduce a greater breach on that law than was ever yet made; for if you take away the neceſſity of delivery of the thing given, it remains merely nuncupative. To this purpoſe conſider the clauſes in the ſtat. of frauds relating

to

to this; which ſeem to me to be applied directly to prevent a miſchief of this ſort. The clauſes are in *ſec.* 19, 20, 21, 22. which have very anxious proviſions againſt diſpoſitions of this kind, requiring three witneſſes, ſolemn declaration of teſtator, fixing the place of making, and to be reduced into writing in ſix days after making. Theſe are in caſes, where no will was made. Next comes another requiſite, where a will has been made. If what the plaintiff inſiſts on, is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though *Fly* had made a will before, it had been equally good notwithſtanding that will, becauſe this relates to revocation of a will in writing by any thing amounting to a teſtamentary act. It would be good againſt the will, as appears from the caſes. Would not that be quite contrary to the plain proviſion of this clauſe, taking away delivery of the thing? Here is then a revocation of a will by words only; *viz.* "this is yours when I die." All theſe clauſes therefore will be overturned, if ſuch evidence is admitted. But it is ſaid, if this is not allowed, it will be impoſſible to make a donation *mortis cauſa* of ſtock or annuities, becauſe in their nature they are not capable of actual delivery. I am of opinion, it cannot without a transfer, or ſomething amounting to that: and there is no harm in it, conſidering how much of the perſonal eſtate of this kingdom, vaſtly the greateſt proportion of it, ſubſiſts now in ſtock and funds: and all the anxious proviſions of the ſtat. of frauds will ſignify nothing, if donation of ſtock, attended only by delivery of the paper is allowed. It might be ſupported to the extent of any given value, and would leave theſe things under the greateſt degree of uncertainty; and amount to a repeal of that uſeful law as to all this part of the property of the ſubjects of this kingdom. Therefore notwithſtanding the ſtrong evidence of the intent, this gift of annuities is not ſufficiently made within the rules of the authorities; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add (what I very ſeldom do, though it has been done by my predeceſſors) that I ſhould be very glad to have this point ſettled by the ſupreme authority; for it highly ought to be ſettled, if there is a doubt, conſidering ſo large a property of this kind.

The bill ought to be diſmiſſed therefore without coſts as to the demand of theſe annuities, or any other part of the inteſtate's eſtate by way of donation *mortis cauſa*.

But as there was a plain intent of bounty and kindneſs to this old man, who lived with him as a ſervant, and, it ſeems, in expectation of what ſhould be given at his death, therefore on the other part of the bill an inquiry ſhould be, what *Moſely* deſerved

over

over and above his maintenance for ſervices performed during life of 6*l*. The account ſhould be taken from a reaſonable time, if the plaintiff thinks fit to pray it.

Milford *verſus* Featherſtonhaugh, *July* 21, 1752. Caſe 146.

LORD CHANCELLOR.

WHERE there is uſury, extortion, and oppreſſion, as in making a mortgage and accumulating intereſt on intereſt, the court often directs in the decree to take every thing moſt ſtrongly againſt ſuch a perſon; and rightly.

Mortgage.

Where direction to take is ſtrongly againſt a perſon in decree.

Buden *verſus* Dore, *July* 22, 1752. Caſe 147.

THE bill ſet out a title, and that certain old terms were ſtanding out. Defendant did not plead thereto, but ſet up a title inconſiſtent with the plaintiff's, though he might have pleaded it. Exception to the anſwer for not ſetting out what deeds and writings defendant had relating to defendant's title. The Maſter allowed the exception.

Defendant not obliged to diſcover his title deeds.

Lord Chancellor allowed the exception to the report; for that you cannot come by a fiſhing bill in this court, and pray a diſcovery of the deeds and writings of defendant's title. If indeed there was any charge in the bill, general or ſpecial, that defendant had in his power deeds and writings of plaintiff's title, an anſwer muſt be given thereto.

The Biſhop of Wincheſter *verſus* Bernard Fournier, *July* 23, 1752. Caſe 148.

At the Rolls.

THE bill was on the foundation of a large demand being ſet up againſt the plaintiff upon a common negotiable promiſſory note for 8,800*l.* which, the plaintiff ſaid, he was a ſtranger to, knew not under what pretence demanded, and therefore came here to have a diſcovery from defendant, for what conſideration and how obtained, and whoſe writing it was.

Promiſſory note fraudulently contrived, depoſited with the Regiſter without trial whether forged or not; and if not ſued on in a reaſonable time, to be delivered up.

The note being produced appeared to be written on a ſmall ſcrap of paper in theſe words: *I promiſe to pay to Mr.* Bernard

Fournier, *Min. or his order, three months from Date hereof the ſum of Eight Thouſand Eight Hundred Pounds for value received, as witneſs my hand,* September *the 4th,* 1740,

B. WINCHESTER.

The defendant admitted the hand-writing to be all his, except the name at the bottom; and that the plaintiff admitted to be his.

The conſiderations given for it, as ſet up by the anſwer, were in this manner: that the defendant was a curate in *Jerſey* in 1740, and courted the ſiſter of Mr. *Payne* the Dean; who being averſe to the match, and to prevail on him to deſiſt, after promiſes of preferment gave him a promiſſory note for 1000*l.* or to procure him ſome eccleſiaſtical preferment in *Jerſey*; upon which defendant deſiſted, and married another woman. That after this there happened ſome diſturbance in the church, of which he was Curate; on which he inſtituted a ſuit before the Dean, who determined it againſt him; and that he appealed to the plaintiff, who from the great intimacy and friendſhip between him and the Dean being averſe to hear the appeal, propoſed to defendant to withdraw it, and ſomething would be done for him; and afterward that the plaintiff ſigned this note, written by defendant by directions of the plaintiff, as a recompence to him.

This anſwer was in almoſt every inſtance contradicted by plaintiff's witneſſes.

Evidence.

The evidence of the Dean as to the note, ſaid to be given by him, was objected to; as ſetting up a forgery in the defendant, and the party himſelf ſhould not be admitted to prove a forgery in avoidance of his own note, as he cannot be admitted in indictments for forgery at ſuit of the crown.

For Plaintiff. Allowing that rule in proving a forgery in indictments, this is not read to prove the forgery, but to falſify the anſwer, which ſaid, the not proſecuting the Dean on that note was the conſideration of the preſent note; the validity of that note being not now to be tried at all.

His Honour for theſe reaſons allowed him to be read, only regarding the ſubſtance of the depoſition, not any thing therein as to forgery.

Counſel or attorney ſubmitting to be examined read.

One of the plaintiff's witneſſes (it was ſaid) being counſel concerned in the affair, ought not to have ſubmitted to be examined

amined, as no counſel, attorney, or ſolicitor ſhould betray the ſecrets of their clients, and might demur to the interrogatories.

Sir *John Strange.*

It is a very right rule; but as he himſelf has not objected to it, the court has nothing to do with it. It never was determined, that the court refuſed his evidence, but the contrary has been determined, that the court is bound to accept it.

For Plaintiff. This note ought to be immediately delivered up without further inquiry. 2 *Ver.* 123. In the caſe of *John Ward of Hackney* the *Lords* directed the *Attorney General* to proſecute for the forgery. In *Succomb* v. *Fitzgerald, June* 15, 1743, the repreſentatives of Mr. *Merrit* (who died inteſtate, ſoon after he came of age, and had been preyed upon by ſeveral) brought a bill to have ſecurities delivered up to be cancelled, and among others a bond ſaid to be executed by him in *Flanders*. It appearing plainly from the bond, it could not be of the date it imported, it was ordered without further enquiry to be depoſited with the Regiſter. So by Sir *Joſeph Jekyl* as to a conveyance in *Maſters* v. *Bramhill* 16 *July* 1735. In *Baker* v. *Loman* 5 *July* 1742, the bill was to have the conſideration of a promiſſory note ſet forth: It appeared to be given in conſideration of a bill of exchange, which was a falſe one. The late *Maſter of the Rolls* enjoined proceedings, and ordered the bill of exchange to the Regiſter ſubject to further order. One *Jones*, a ſchoolmaſter in *Kent*, provided and did every thing for a ſcholar, intitled to a ſmall real eſtate, the income of which was not ſufficient to maintain him; and deſired the ſcholar, when ſick and likely to die, to make him amends, and took an abſolute conveyance of this eſtate: on a bill by the heir to enquire whether the conſideration was really paid, Lord *Talbot* ordered the deed to be ſet aſide as an abſolute conveyance, and to ſtand as ſecurity for what was juſtly due. There are ſeveral caſes of that kind. Plaintiff has no means of proceeding at law. Defendant may, when he will, and is to take the firſt ſtep. The ſtat. of limitations only takes away the legal operation; ſo that if the plaintiff makes a proviſion for payment of debts, it may be ſet up at any future time againſt his executors, when a proper defence cannot be made. Several obſervations occur on face of the note: it ſeems the ſuperſcription of a frank eraſed; which ingenuity the defendant, who is a *Frenchman*, has brought from the ſeminaries, where he was educated: and a ſtrong argument ariſes from one in mean circumſtances letting a legal bar run, when the perſon againſt whom, was of ability to pay.

For

For Defendant. Though this imports a common negotiable note, defendant did not conſider it as ſuch, but as an obligation on plaintiff to give him a living. The bill is *quia timet*, and that defendant has forged a note on a fictitious conſideration. It can be ordered to be delivered only on this, that defendant is guilty of forgery: and the decree muſt be, that it be cancelled, and, according to ſome old books, damned. That will never be done without firſt a proper examination, if there is but a bare poſſibility of its being juſt. None of the caſes cited are on forgery: all on fraud and particular circumſtances, on which this court has the only juriſdiction; for there are two ſpecies of fraud: that on the 13 and 27 *Eliz.* is more proper to be determined at law than here; but complicated fraud in the ſenſe of impoſition is the proper buſineſs of equity, and not to be tried at law. It was attempted to be tried in *Holt* v. *Teril* 1727, upon an iſſue, whether the party executing a deed well underſtood it or not. Lord *Raymond* thought it an extraordinary iſſue to be ſent out of a Court of Equity. If there are two reaſons for ſetting aſide an inſtrument, one the complicated queſtion, fraud or not, the other whether it was the act of the party or not, the court will firſt inquire into this. In a late caſe of *Bridge* v. *Eddows*, Mrs. *Eddows* brought an action on a bond; the bill was to ſet it aſide as forged and without conſideration, and to be delivered up: it was proved plainly, that the party ſaid to execute, was at another place at the time fixed on for execution: *Lord Chancellor* ſaid, he could not try it, it was a fact of forgery he could not enter into, and that it muſt be tried: but it never was, the iſſue being taken *pro confeſſo*: which ſhews, that though there is a great charge of improbability, the court will not do it without a trial.

Sir *John Strange.*

The bill is indiſputably proper to be entertained and proceeded on in this court. The defendant has anſwered it as ſuch, and entered into proof of it. As to the light in which the court is to ſee this tranſaction, if in a fair light, the bill muſt be diſmiſſed: if doubtful, ſo that inquiry is neceſſary, the court ought in ſome ſhape or other to ſend it to an inquiry: otherwiſe not. But the light it appears in, is the moſt iniquitous, even in the manner inſiſted on by defendant, I ever ſaw before a court of juſtice. The defendant, being called on to this diſcovery, puts it by his anſwer, not upon its being a voluntry note (which would have been a very different caſe) but that it was on a proper conſideration, and as ſuch is not relievable againſt in a court of equity: but the conſideration he ſets up, and the original foundation which he lays of the tranſaction with the Dean, are not proved by him, but on the other hand are falſified every one of them.

them. But ſuppoſing it taken, as argued, to be only a ſort of hank on the plaintiff to oblige him to get the defendant a living, a Court of Equity would not ſuffer ſuch a note thus obtained, even by the account defendant gives, to ſtand out againſt the plaintiff, when the defendant avows, he does not or ought not to expect any money by it, but to obtain a beneſice merely by having ſuch a note hanging over plaintiff's head. In that light therefore it is proper to conſider it as an impoſition, and not to receive countenance in a Court of Equity. It is admitted, there are great improbabilities againſt this note: all that is inſiſted on is a bare poſſibility. But great ſuſpicion ariſes from the face of it. Suppoſing every word of it to be the hand-writing of the plaintiff, and ſo found by a jury, if after ſuch a verdict I ſee fraud apparent and an iniquitous tranſaction, why ſhould I ſay, the plaintiff ſhould not have that relief in a Court of Equity, merely becauſe the impoſition and fraud may be attended with a worſe crime, than the fraud and impoſition itſelf? I do not ground myſelf on ſetting it aſide, becauſe it appears forged; but on this, that whether forged or not, it is not fit to ſtand in a Court of Equity: which, if it was found, the plaintiff had wrote with a view only to get defendant a living, the court would not let ſtand upon ſuch a conſideration, or eſtabliſh ſuch a demand if a bill was brought for it. The caſes cited to be ſure differ materially from this; being where the inſtrument itſelf is admitted in a court of law, and relief is ſought againſt it upon circumſtances: here the note itſelf is not admitted. I am not quite warranted by precedents to order it to be delivered up: but am well warranted to order it to be left in the hands of the officer, ſubject to the order of the court, and declare, that the plaintiff is intitled to be relieved againſt this note as a groſs fraud and contrivance of the defendant, and that nothing is due upon it. My reaſon for leaving it in the Regiſter's hands is, that though I do not require any trial to inform my conſcience, yet I will not deprive him of liberty to bring his action, if he thinks fit. If he does not aſſert it in a reaſonable time, then to be delivered up.

The defendant muſt pay coſts.

In *John Ward* v. *Duke of Bukingham*, *Ward* inſiſted on an allowance of 700 tun of allum. The court decreed him not intitled thereto: but obliged him to leave on the land the quantity required by his leaſe. He appealed; and to intitle him to that allowance produced an exhibit; which the Lords laid hold of, and directed him to be proſecuted: but there was no decree of Chancery upon that.

Case 149. Senhouse *versus* Earl, *July* 23, 1752.

Plea.

If no final order for foreclosure it is not a good plea.

PLEA to a bill for redemption.

Lord Chancellor said, he remembered a case of this sort, *Jones* v. *Kenrick*; where to a bill for redemption there was a plea of decree for foreclosure in the common form, with averment of non-payment of the money, *&c.* but no final order for foreclosure: and it was an old decree: but notwithstanding that, Lord *King* allowed it. From which, he knew, there was an appeal; and (though it was said at the bar to be compromised) he took it to be reversed; for it was apprehended to be wrong; as, notwithstanding such plea and length of time may be a good defence, yet as a plea it could not stand for want of a final order,

It was the antient practice, that on a decree at law order to stand foreclosed unless the money paid by a certain future day, the mortgagor after the day was absolutely foreclosed of course. But now that order is in nature of an order to shew cause, which must be made absolute by a future order, on affidavit was not paid at the day, to stand absolutely foreclosed. By Lord Hardwicke 30. July 1737 in the Exchequer Jordan & Wife & Sparks & Others & Sedgwell & Others. Rep. vol. 1. p. 54. & according to the note in the bill in this case or Sheriff & Sparks the bill was not to redeem, & such an order being pleaded in bar to the bill to redeem the plea was overruled. on bill to foreclose

LORD CHANCELLOR.

Mortgagee not to discover title-deed, if he denies notice.

It is a constant, invariable rule, that any mortgagee may protect himself from discovery of his title-deed, if he denies notice. As to a jointress it is otherwise: where the plaintiff claims as heir at law to the person, who made the jointure, and no appearance of any settlement, the court will upon plaintiff's offer to confirm the jointure oblige a production of the deed. But as to a mortgagee, if the plaintiff brings his bill to redeem ever so strongly, he is not intitled to see mortgagee's title deeds; because a third person may find out a flaw in them. The same appears on motion, where a sale is to be to raise the mortgage-money; which shews, how cautious the court is as to that. It is a first principle, and not to be argued; it depends therefore on the denial of notice. The rule of the court is, that where the plaintiff charges not only notice in general, but also special facts and circumstances, they must be denied as well as notice in general.

But special charges to be denied as well as notice in general.

Jointress must produce the deed to heir confirming her jointure.

Case 150. Chetwynd *versus* Lindon, *July* 23, 1752.

Demurrer to discovery of conspiracy in setting up a bastard; overruled.

DEMURRER to such part of the bill, as sought to compel defendant to discover a conspiracy or attempt in the defendant in setting up a child, she pretended to have by a person, who kept, and was desirous to have a child by her. The demurrer was, as it might tend to subject defendant to punishment or fine, or the penal laws of this kingdom.

Lord

Lord Chancellor desired to be read out of the bill, what charges there were of that kind as to subject defendant to such penal laws. She may demur to the discovery of any thing which may prove cohabitation. The question is, whether it is so charged, as, if confessed in the answer, would be a ground for a criminal prosecution in a court of law; for it is not every conspiracy will be a ground for a criminal prosecution. If that was the case, almost all the causes in this court would come within that description. The boundaries are often very nice, where a matter is near indictable and a fraud in this court. This setting up a bastard child is a private fraud; does not impede the course of descent in law so as to defeat the heir at law; for if so, perhaps it might be a conspiracy indictable: but this is to the disherison of no one: and by this means several frauds in this court might be covered by demurrer. Nor is it distinguished, what the particulars are, which are demurred to; so that the court must look over the whole bill in order to see. It is like the case of a plea, which begins with, as to so much of the plea, as is not after answered to, the party pleads; which has been often over-ruled; for it cannot be known, what would be pleaded to, and what answered.

Particulars demurred to should be distinguished.

Anonymous, *July* 24, 1752. Case 151.

ON motion relative to a proceeding in Ecclesiastical Court for a church-rate *Lord Chancellor* would not receive it. It was turning every thing into *English* bill in this court: the Ecclesiastical Court had jurisdiction of it. If there was any thing like prescription to discharge therefrom, that must be pleaded, and denied; which is the common case of a *modus*, for which there may be a suit in the Ecclesiastical Court, or for a customary payment, as well as for tithes. If the *modus* is admitted, they may go on in the Ecclesiastical Court: if denied indeed, there must be a prohibition. Next as to the discovery sought, the coming into this court in aid to the Ecclesiastical Jurisdiction is always denied here. The plaintiff cannot, because this court will not be ancillary to that: nor does the defendant there want it, because he may exhibit articles in that court, and have an answer on oath, which is the constant method there.

Ecclesiastical Court has jurisdiction as to church-rates.

This court not ancillary thereto.

Anonymous, *July*, 24, 1752. Case 152.

ON motion *Lord Chancellor* said, that before the making the act of parliament as to solicitors bills, the rule was, that in a court of common law, if application was made to tax an attorney's

Solicitor's bill taxed without bringing the money into court as formerly.

The judgment not afterward opened for the client to have an account taken.

ney's bill, it was not done without bringing the whole demand and money into court, and then to have it taxed. This was thought a great hardſhip on clients at the time of making this act; becauſe an attorney might make a very unreaſonable bill, and put a burden on his client to raiſe it; the act of parliament therefore varied the rule both of courts of common law and equity; ſo that the client ſubmitting to pay what ſhould become due, the bill ſhould be taxed, and that without bringing the money into court. Then the client cannot afterward come, and ſay, he had an antecedent demand before, and deſire to have that deducted out of what was taxed due to the ſolicitor for his bill. The court is to be ſure to ſee, that ſolicitors do their clients juſtice: yet the giving way to this would repeal the act of parliament, and put ſolicitors in ſuch a condition, they might never come at their demands, if the court was to ſay, they would open the judgment (for it is a judgment of the court upon the client's own ſubmiſſion to pay what ſhould be due) to let in this, and have the account taken. The party therefore has precluded himſelf; for he had two methods; he might apply to tax the bill, and then muſt ſubmit to pay; or, if there were accounts between them, might have brought a bill for that account, and alleged, he was indebted to the ſolicitor, or that the ſolicitor pretended, he was, for bill of fees and diſburſements, and prayed to have that account taken: but he has waved that, knowing it to be ſo. And in general, accounts cannot be taken on taxation of a bill. The court could not now ſtop the payment of it to have the account taken; that would make theſe things ſo uncertain, there would be no end of them: nor would it make a precedent of that kind.

Caſe 153. Griffith *verſus* Hood, *July* 24, 1752.

LORD CHANCELLOR.

Bill for wife's ſeparate eſtate, by Prochein Amy: but where with huſband, ordered to truſtee for her.

WHERE there is any thing for ſeparate uſe of a wife, a bill ought to be brought by her *Prochein Amy* for her: otherwiſe it is her huſband's bill. However there have been caſes of ſuch a bill by the huſband and wife, and the court has taken care of the wife, and ordered payment to ſome perſon for her.

Caſe 154. Morris *verſus* Leſſees of Lord Berkeley, *July* 25, 1752.

Injunction to ſtay building muſt be on ſtopping antient lights by preſcription, or on agreement.

MOTION to continue injunction to ſtay building.

LORD

LORD CHANCELLOR.

Whoever comes into this court on ſuch a right, muſt found it either on defendant's building ſo as to ſtop antient lights, for which he has a preſcription, (notwithſtanding that he muſt lay a particular preſcription) or elſe on ſome agreement, either proved or reaſonable preſumption thereof. An inſufficient anſwer is not a ground to continue an injunction: it muſt be excepted to, and then if reported inſufficient, application may be to revive.

Attorney General at the Relation of Gray's Inn Society *verſus* Doughty, *July* 24, 1752. Caſe 155.

MOTION before anſwer to ſtop proceeding in certain buildings, which would intereept the proſpect from *Gray's Inn* gardens.

Injunction not before anſwer in a ſpecial caſe on a particular right: otherwiſe in a plain caſe of waſte or nuſance.

The interpoſition of the court was deſired not on foundation of a nuſance, but on a long enjoyment of the right to this proſpect by this ſociety; which right has been admitted formerly by parties concerned to diſpute it, and by a court of equity; *viz.* in 1686, when ſeveral orders on petition were made by Lord *Jefferies* to reſtrain the building ſo as to intercept this proſpect; and the manner of defence thereto ſhews, this right of the ſociety was not diſputed, it only going upon this, that the court was impoſed on by the plan ſhewn. That rights of this kind have been taken notice of, appears from the act of parliament made for adorning *Lincoln's Inn*, where the parties acquieſced under ſuch a right.

LORD CHANCELLOR.

Before I determine this, there is a previous queſtion, whether I can do it in this way. It is true, that by the courſe of the court in a plain caſe of waſte upon a certificate, and affidavit of it, there may be an injunction before anſwer. So there may in a plain caſe of nuſance, as for ſtopping up lights, upon affidavit, certificate and notice; becauſe the court will not ſuffer it to go on to prejudice the party in the mean time, but will ſtop it beforehand: but now you come in a very ſpecial and particular caſe on a particular right to a proſpect. I know no general rule of common law, which warrants that, or ſays, that building ſo as to ſtop another's proſpect is a nuſance. Was that the caſe, there could be no great towns; and I muſt grant injunc-

tions to all the new buildings in this town; it depends therefore on a particular right; and then the party muſt firſt have an opportunity to anſwer it. As to the orders made by Lord *Jefferies* (who was too apt to do things in an extraordinary manner, *fortiter in modo* as well as *in re*) they were made on petition without a bill filed; and thoſe I lay out of the caſe. There may be ſuch a right as this; as upon the act of parliament touching *Lincoln's Inn*. That was upon agreement of the parties; which if ſhewn here, it would be different; or if there was ground to preſume ſuch an agreement: but then the party muſt have an opportunity to anſwer that. This is not ſuch a right, as that the court ſhould interpoſe before anſwer. It is like the common caſe of a bill to ſtay waſte upon a ſpecial caſe attended with ſpecial circumſtances; in which the court will not grant an injunction before anſwer. I have often denied thoſe motions; and it has been often formerly denied. If it is ſhewn, that the defendant claims under the party, who made thoſe ſubmiſſions and admiſſions, (as it is ſaid) before Lord *Jefferies*, and a preſumption of an agreement, it may be a different caſe. As you have given them notice by filing your bill, and ſtronger notice by this motion, if they do wrong, it is at their peril; and it might be a ground for the court to order theſe buildings to be pulled down: ſo that if they build, it is at their peril. I have great reſpect for this ſociety: but muſt notwithſtanding go by ſome rule, and cannot do it in this ſummary way.

Caſe 156.

Grayſon *verſus* Atkinſon, *July* 17, 1752.

2 Stra. 1109. Not neceſſary on Stat. of Frauds that teſtator ſhould ſign in preſence of the witneſſes; acknowledging his hand to them ſufficient, though at different times. But one of the witneſſes being beyond ſea, and no other proof as to him, there ſhould have been a commiſſion to examine him, and the ſame credit is not given to his hand-writing as if dead.

BILL to eſtabliſh a will againſt an heir at law, who by his anſwer made a doubt, whether as all the witneſſes did not ſee the teſtator ſign, though he ſaw all them ſign, this was a good atteſtation within the ſtatute of frauds.

For plaintiff. The queſtion is, whether by the ſtatute every witneſs ſhould ſee the teſtator ſign? Firſt on the ſtatute itſelf; next on ſimilar deciſions leading that way. This is a matter merely poſitive, not depending on reaſon. If the ſtatute has laid it down as a ſolemnity, it muſt be obſerved; otherwiſe not. There are no words ſaying, that the witneſſes ſhall ſee the teſtator ſign, or that he ſhould ſign in their preſence; which if the legiſlature had required, they would have ſo ſaid, but not having required it, a court of juſtice cannot, though it might be a further guard: for this would be adding a further ſolemnity to the ſtatute. Indeed the common form of atteſtation of wills is ſo; but the queſtion is, whether it is abſolutely neceſſary? So is ſealing and delivery a ſufficient publication without

without actual publication: yet moſt wills are in that form, ſigned, ſealed, and publiſhed. Next the caſes go a great way to ſettle this. If the authenticity is ſecured by the teſtator's ſigning, it is not neceſſary to ſee it: all the caſes and doubts go upon a ſuppoſition, that it is not neceſſary. The very arguing the doubt, whether it is neceſſary for all the witneſſes to ſign at once, goes upon this, that it is not neceſſary for the teſtator to ſign in preſence of them all; for the legiſlature did not intend, the teſtator ſhould ſign three times over. In 2 *C. C.* 109. and *Cook* v. *Parſons*, *P. C.* 184. and *Lemayne* v. *Stanley*, 3 *Lev.* 1. it is taken for granted that the witneſſes did not ſee the teſtator write his name. In *Smith* v. *Codron*, 7 *July* 1732, *A.* ſigned and publiſhed a will in the preſence of two, who atteſted in his preſence; then a third perſon was called in; and the teſtator ſhewing him his name tells him, that is his hand, and bids him witneſs it; which he did, and ſubſcribed his name in the teſtator's preſence; and two hours after tells him, that, which he had ſubſcribed was his will. Sir *Joſeph Jekyl* held this a good execution, the ſtatute not ſaying that the will ſhould be ſigned in the preſence of three, and it having been determined not to be neceſſary that they ſhould ſee him ſign his name, nor that all the witneſſes ſhould ſign at one and the ſame time. So *Stonehouſe* v. *Evelyn*, 3 *Will.* 254. But a later caſe was that of *Jones* v. —— in *B. R. Hil.* 1742. where a caſe was made upon ejectment againſt the defendant, who claimed for life under a will made all in the teſtator's own hand-writing. In *December* 1735. two witneſſes ſigned, and he ſigned his name, and took off his ſeal from the wafer, which had been fixed before. In *January* 1739. the teſtator, producing the paper ſo ſigned, deſired another to be witneſs to his will; and then with a pen dipped in ink the teſtator went over his name, and then delivered the paper as his act and deed. The only queſtion was, whether it was well executed within the ſtatute, not being done in preſence of all the witneſſes together? Againſt the will was cited an *obiter* opinion of *Holt* in *Carthew* 38. and *Juſtin. lib.* 2. that by the civil law ſeven witneſſes were required and all at the ſame time. In favour of the will *P. C.* 184. *Lee* C. J. ſaid, that from the words of the act there was no direction, that the witneſſes ſhould be all together at the time of ſigning; that the caſe in *P. C.* determined ſoon after the making this act, was, that if the teſtator ſigned in preſence of three at different times, yet it was within the act; ſo was *Eq. Ab.* 402. that the opinion in *Carth.* was not material to the point in queſtion there; and that the foundation, upon which wills under theſe circumſtances were ſupported, ſeemed to be, that the act of parliament had laid down no further requiſite than to be atteſted by three in his preſence. The reſt of the court were of the ſame opinion; and what all the judges

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judges went upon, was this, that by the words of the ſtatute it was not neceſſary for the witneſſes all to ſee the teſtator ſign; and did not go upon the circumſtance of drawing his pen over.

For defendant. The legiſlature meant, that the teſtator ſhould ſign in the preſence of three. Witneſſes are not only to ſubſcribe, but to atteſt and ſubſcribe; therefore, it muſt mean more, than one ſingle word would anſwer. The atteſtation muſt be proper and relevant to the act of the teſtator, an atteſtation that the teſtator did ſign in their preſence; and therefore neceſſary they ſhould ſee it. The ſubſcribing was for another purpoſe to be in the teſtator's preſence, that thoſe witneſſes ſhould not impoſe another will upon him, and that he might have a check over them, that they ſigned that very will in his preſence. That was the intent, though not fully expreſſed: but the next clauſe, of revocation, makes it ſtronger, and muſt be taken together upon a ſimilitude of reaſon. The ſenſe and uſage of mankind is a key to the equivocal words of an act of parliament; and drawers of wills ſay, ſigned, ſealed, and publiſhed in preſence of three. Many of the caſes cited have been founded upon this, whether it was neceſſary to ſign in preſence of teſtator at the ſame time; which is not all, that was intended, being provided for by the act of parliament. Any ſolemn act, as putting a mark, is the ſame as ſigning. So is ſealing a ſolemn act. It has been held at *Niſi prius*, that where the three witneſſes were dead, a jury would imply, that it was properly done, ſigned in teſtator's preſence, though not proved. There was a caſe lately before *Your Lordſhip* upon this very queſtion, which came from *New England*; it was ſent to *B. R.* to ſee, whether it was good or not.

LORD CHANCELLOR.

That was upon the clauſe of revocation. This has been *vexata queſtio* a great while; whether to make a will effectually according to the ſtatute the ſigning of the teſtator thereto ſhould be in the preſence of all or indeed of any of the witneſſes, or whether the teſtator's acknowledging the hand-writing to that will to be his is not ſufficient? Sometimes it has come in queſtion upon wills: at other times upon the clauſe relating to revocations. The preſent queſtion relates particularly to a will, and is a proper queſtion at law to be determined there upon a trial, if the heir inſiſts upon it. Sometimes in caſes of little value, or where the parties to avoid expence are deſirous to ſubmit it upon the evidence here, the court has gone into it (as appears on the caſes cited) and given an opinion. So will I do; but leave it to the election of the heir, whether he thinks fit to have it tried. The queſtion ariſes upon the

firſt clauſe; but it is certainly true, that the ſecond, which immediately follows, is to be coupled in the conſtruction, and an expoſition of the act drawn from both together. The difference in the penning of the two clauſes has created the doubt. It is material to conſider the original and natural import of the words upon the firſt clauſe; and then how far the ſenſe and conſtruction of them is varied and operated upon by the ſubſequent clauſe. Taking it upon the firſt, it is inſiſted, that the word *atteſted* ſuperadded to *ſubſcribed* imports, they ſhall be witneſſes to the very act and *factum* of ſigning, and that the teſtator's acknowledging that act to have been done by him, and that it is his hand-writing, is not ſufficient to enable them to atteſt; that is, it muſt be an atteſtation of the thing itſelf, not of the acknowledgment. To be ſure it muſt be an atteſtation of the thing in ſome ſenſe; but the queſtion upon this clauſe, as abſtracted from the ſubſequent, is, if they atteſt on the acknowledgment of the teſtator, that that is his hand-writing, whether that is not an atteſtation of the act, and whether not to be conſtrued as agreeable to the rules of law and evidence as all other atteſtation and ſigning might be proved? At the time of making that act of parliament, and ever ſince, if a bond or deed is executed by the perſon, who ſigns it; afterward the witneſſes are called in; and before thoſe witneſſes he acknowledges that to be his hand; that is always conſidered as an evidence of ſigning by the perſon executing, and is an atteſtation of it by them. It is true, there is ſome difference between the caſe of a deed and a will in this reſpect, becauſe ſigning is not neceſſary to a deed, but *ſealing* is; and I do not know, it was ever held, that acknowledging his ſealing without witneſſes, has been ſufficient. But notwithſtanding, that is the rule of evidence relating to ſigning. If it was in the caſe of a note, or declaration of truſt, or any other inſtrument not requiring the ſolemnities of a deed, but bare ſigning, if that inſtrument is atteſted by witneſſes, proving that they were called in, and that he took that inſtrument, and ſaid, that was his hand, that would be a ſufficient atteſtation of ſigning by him. That is the rule of evidence: conſidering therefore the words of the act of parliament it ſeems upon the penning of that clauſe, that if the teſtator having ſigned the will did before thoſe witneſſes declare and acknowledge, he had ſo, and that that was his hand, that might be ſufficient within that clauſe; for as to the ſubſcribing that makes no difference in the caſe; that further circumſtance is required by the ſtatute to make it neceſſary, that they ſhould certify their atteſtation all of them in preſence of the teſtator; therefore is ſubſcription mentioned. Other guards are put on the ſtatute on the execution of a will beſide the ſubſcription; as that it is to be in writing. The teſtator muſt do ſome act materially declaring it to be his will, though no particular form of words is neceſſary. It is true, there are caſes, where an inſtrument ſealed, and delivered, and ſubſcribed by the teſtator has

been held ſufficient to make it a will, but there muſt be ſome act or declaration importing this to be a ſolemn act by him to diſpoſe of his eſtate. I ſhould have thought, the greateſt guard upon the teſtator's executing a will would be the requiring all the witneſſes to be together at the time; yet it is admitted, that ſo far the caſes have gone, that the teſtator's ſigning in preſence of the witneſſes may be at different times. In that caſe, in which there was the circumſtance of the teſtator's dipping a pen in ink and drawing it over his name; that was inſiſted upon at the bar there as a material circumſtance, though it is now ſaid not to be thought ſo by the court: but ſtill it diſpenſes with the teſtator's ſigning in their preſence at the ſame time. It is a much greater ſecurity againſt perjury to require all to be preſent at the ſame time and inſtant of doing the act; becauſe they are then checks on one another: but if ſuffered to be witneſſes at different times and places, a more material guard is diſpenſed with than this, which relates barely to the act of ſigning. Thus it ſtands on the words of the clauſe itſelf, penned on the common practice and uſage in point of evidence as to the ſigning of inſtruments which do not require the ſolemnities of deeds. Now to the other clauſe as to revocation, how far to be coupled in conſtruction and operating in the expoſition upon the former. This clauſe ſuppoſes two kinds of revocation in writing, by a proper will diſpoſing of the eſtate or other writing declaring the ſame not being a will. The other example of revocation by burning or cancelling is not material to this caſe. It conſiſts of two members referring to two different inſtruments; and I hold; that a prior will may be properly revoked by another will made according to the directions of the former clauſe, that is, a perfect will publiſhed by deviſor atteſted by three witneſſes, who all ſubſcribed in his preſence; and then the ſenſe is compleat. Then thoſe words *ſigned in preſence of three witneſſes* refer to *other writing* of the deviſor, *viz.* ſome other writing or revocation, and do not operate on that, which is a perfect will; for that, which is a perfect will, will revoke a former; and therefore thoſe words are added to put a guard on that other writing, which may not be a will. If then this is the ſenſe of the legiſlature, the words *other will or codicil* muſt be taken according to the requiſites and ſolemnities neceſſary by the former clauſe to a will or codicil: but if it is a diſtinct writing, not a will, then is this additional requiſite: and if this is the true conſtruction of the latter clauſe, it will not affect the words *atteſted and ſubſcribed in preſence of, &c.* Next to conſider the caſes, which, I thought, had been more various, than they appear. Firſt 3 *Lev.* 1. is an expreſs authority, and muſt have been by an acknowledgment of the teſtator's hand (for it could not be otherwiſe) and yet held good. No anſwer can be given to it but a preſumption, that the teſtator might write the will in the preſence of three witneſſes: but that is not a natural preſumption, for if the fact

was

was to, that would be found by the jury, as it would put it out of all doubt. It is true, that three judges differed from *Levinz*, upon another point, as to the ſealing. I own, I ſhould have much more doubt of that, which they held further; for the ſtatute requiring the will to be ſigned, undoubtedly meant ſome evidence to ariſe from the hand-writing; then how can it be ſaid, that putting a ſeal to it would be a ſufficient ſigning? For any one may put a ſeal; no particular evidence ariſes from that ſeal; common ſeals are alike and one man's may be like another's; no certainty or guard therefore ariſes from thence. The anſwer of *Levinz* (who was a great lawyer) is material and ſtrong thereto; that where an act of parliament mentions ſigning, it meant ſomething different from ſealing: but the whole court agreed on the former reaſon in that, which muſt go upon the point now in queſtion. The other caſes are ſome of them in point. The opinion of Sir *Joſeph Jekyl* in thoſe two caſes are very ſtrong to this purpoſe: and if ſo, and the words of the ſtatute are anſwered by it, there is no ground for me to hold the contrary. As to the caſe in *B. R.* the reaſon according to the ſtate of it goes upon what I go now, not upon the circumſtance of drawing the pen over. I do not ſee, how that ſtrengthens the guard; and it is allowed, that ſigning *toties quoties* is ſufficient. Therefore on the penning of the act and the authorities, my opinion is, that this will is well executed: but being a queſtion of law, if the heir at law inſiſts upon having it tried, I will direct a trial: if not, I will found my opinion upon his declining it.

Hoil v. Clerk, 3 *Mod.* 218. was then cited as ſtrengthening his *Lordſhip*'s determination, although there was a difference of opinion.

A farther objection was made for the defendant, that one of the witneſſes being beyond ſea the other two prove all the ſolemnities except the ſigning: but though they ſwear, the teſtator acknowledged his hand-writing to them at different times, yet they do not ſwear, he acknowledged to that third witneſs, who is abroad: nor is there any proof about him.

For plaintiff. The court requires to the eſtabliſhment of a will, that the ſubſcribing witneſſes ſhould be examined, if they can: if they cannot, the court gives credit to the hand-writing, ſo as to eſtabliſh it if all the three witneſſes are dead; and therefore it is only neceſſary to prove that they are dead, and that that is their hand-writing. A court of law does the ſame: the court goes one ſtep farther here, requiring all three to be examined if alive, and can be had: but if beyond ſea and not amenable to the court, ſo that he may refuſe to be examined, the court does not require a commiſſion to go. There is no inſtance where two witneſſes are here,

here, and an atteſtation of a third who is proved to be beyond ſea, that the court ſtopt the declaration to have that witneſs examined. It is not neceſſary to the title at law to have him examined. So as to all deeds and inſtruments, if the witneſſes cannot be had as not being within the proceſs of the court, or dead, credit is given to their hand-writing. They may all three atteſt at different times, as is now clearly eſtabliſhed. It may happen, that no witneſs can be of their atteſtation but the witneſſes themſelves. If dead, and credit is not to be given to their handwriting, there is no way in which ſuch a will can be eſtabliſhed. Where a witneſs cannot be had, the court does not require an impoſſibility; for that third witneſs may be in *America*, may refuſe to be examined, or may expect money for it; the court will eſtabliſh it without him; otherwiſe fraud may be uſed. The ſame credit is to be given to his hand-writing as if dead.

LORD CHANCELLOR.

Of that I doubt. I do not know, that it is determined, that the ſame credit is to be given to the hand-writing of a witneſs beyond ſea as if dead; becauſe it is not neceſſary to preſume, that it is out of your power to get him, if you pleaſe; and I am apprehenſive, fraud may be uſed on the other hand. It not being proved that the teſtator publiſhed his will in the preſence of the other witneſs, not only of thoſe examined, and that the other witneſs ſubſcribed in their preſence, it ſtands on the proof of the atteſtation. If the witneſs was dead, it might poſſibly be ſufficient; that is the act of God; and therefore the court gives credit to his hand-writing: but you have brought a bill to eſtabliſh the will by a decree, and only prove his being beyond ſea. The queſtion is, whether your proof is not defective, and whether to eſtabliſh this you ſhould not have ſome proof, that this act was done, which he has atteſted: becauſe you may have a commiſſion to examine the witneſs beyond ſea; for in this court you are not under the difficulty as in a court of law, where it muſt be *viva voce*; how then can I make a declaration, that the will is proved, unleſs this witneſs himſelf is examined? I know no ſuch rule of law, as exempts you from the neceſſity of proving the facts materially, although you are exempted from the neceſſity of bringing that witneſs. You muſt therefore try it, if you thing fit.

For plaintiff. It was formerly not required to have all the three witneſſes examined: it was firſt eſtabliſhed by Lord *Talbot* in this court; for in the caſe of the *Duke of Buckingham* they were not all examined.

LORD CHANCELLOR.

All, I can do at preſent, is to direct a trial at law.

White *verſus* Hayward, *July* 1752. Caſe 157.

THE bill was at the hearing diſmiſſed with coſts to be taxed; they are taxed; and the proper proceſs iſſues for them againſt plaintiff, who for non-payment of them is brought into contempt and in the *Fleet* on attachment with proclamations. Defendant dies; there is no revivor, plaintiff moves to be diſcharged out of cuſtody, becauſe there is no perſon in being who has a right to detain him there, nor to ſuſtain the execution; the reaſon given for the cauſe not being revived was from an apprehenſion in the parties that there could be no revivor for coſts only. *Lord Chancellor* held there clearly might for coſts taxed, by which they are reduced to a certainty and a duty decreed, but the doubt was whether the plaintiff muſt be detained in cuſtody to wait for that revivor or be diſcharged? And he deſired to know how that was in the courts of common law; for there if defendant is in execution for coſts; lies in execution, and the party, to whom coſts are given, and who took out execution, dies; there may be a proceeding for thoſe coſts by the repreſentative of the party's taking out a *ſcire facias*, and there may be a new execution. But the queſtion was, whether the judges on application do not diſcharge him out of cuſtody, or whether they wait for the bringing the *ſcire facias*? He apprehended, they do diſcharge out of cuſtody: in caſes of injunction in this court, the court exerciſes a more liberal juriſdiction than courts of common law; as, if plaintiff obtains an injunction on the merits, and dies; yet the defendant cannot immediately proceed at law, but muſt come into the court to diſſolve the injunction. But courts of common law have not the ſame power to compel the party to bring a *ſcire facias*, or to put terms on him; but muſt take things as they find them. It was urged, that the cauſe was out of court by the bill's being diſmiſſed with coſts. But *Lord Chancellor* ſaid, it was not out of court as to this; that if there is a judgment againſt plaintiff, the judgment is, that defendant *eat ſine die*: yet there is a judgment for coſts, which is a diſtinct judgment, and a *ſcire facias* may be brought for that; ſo that as to this the cauſe was not out of court. But the queſtion was, how far he could detain the perſon of the party in court, until a bill of revivor is brought or a *ſcire facias*. He took it, that this followed the rule in caſes of accounts; where the court gives liberty to defendant to revive after a decree for account; becauſe both parties are conſidered as actors. And ſo were to be conſidered in this caſe; but deſired to ſee, what was the rule

Coſts die with the party, unleſs taxed; when ſomething is to be done, &c.

of the common law courts as to this, before he determined it, and that it ſhould be mentioned again.

July 25th. It was moved again: when having looked into the common law caſes, the *Lord Chancellor* delivered his opinion.

Poſt. Kemp v. Mackrell, 8 Auguſt 1754.

This is a thing, which does not often happen, and deſerves conſideration. No doubt but as to coſts the eſtabliſhed diſtinction is, that whether given to plaintiff or defendant, by death of the party before they are taxed, ſo that they are uncertain and unliquidated, they fall to the ground; becauſe it is a perſonal demand in nature of a *tort*, and dies with the perſon. But if taxed, they become a certain duty decreed; and though the party, to whom they are given, dies, they go to the repreſentative, who is intitled to ſome remedy or proceſs of revivor for thoſe coſts. This has been determined by Sir *Joſeph Jekyl*, and by me in *Baſſet* v. *Prideaux*, *March* 1742. where the bill was for coſts only, which had been taxed; defendant pleaded, that plaintiff as adminiſtrator could not revive for coſts only; I was of opinion, the plaintiff might; and that is the difference. Here the perſon, for whoſe benefit the coſts are given and execution taken, dies; plaintiff on this proceſs of contempt in nature of execution for this, which by the taxation is a kind of duty decreed, being in cuſtody and in nature of a defendant, applies to be diſcharged; the queſtion is, whether any one has on this proceſs a right to detain him, or whether he is to be diſcharged? To determine which, it is neceſſary to conſider, how far the proceſs of the court is to be reſembled to proceedings at common law, and how far they differ; for in ſome inſtances they do differ; becauſe the proceedings at common law in writs of execution are either *in perſonam* or *rem*; if *in rem*, it is clearly for the thing: if *in perſonam*, it is not to take for a contempt, but to take ſo that the ſheriff have his body in the King's courts ſuch a day to ſatisfy plaintiff ſuch a ſum of money; theſe are the words of the proceſs; and this is the end of the writ, therefore that is to pay a certain duty. But all the proceſſes of a court of equity are for a ſuppoſed contempt, yet the court makes a diſtinction, and ſupports its proceſs for contempt after a decree by way of analogy to the common law. Suppoſe a judgment obtained by defendant againſt plaintiff, that defendant *eat ſine die*, and a judgment for coſts (all which judgments are by the ſtatute) defendant may take out a writ of execution for thoſe coſts againſt plaintiff; ſuppoſe plaintiff is in execution and defendant dies, who is as to this an actor; or ſuppoſe a plainer caſe, plaintiff had judgment for debt and coſts, and takes out execution by *capias ad ſatisfaciendum*; defendant is in cuſtody thereon, and then plaintiff dies; which comes to the ſame thing; in that caſe defendant has no right to be diſcharged out of cuſtody, in my opinion; my reaſon is this. Judicial writs do not ordinarily

abate

abate by death of the party, though there are certain writs called judicial, which may: original writs do abate by death of the party: but writs of execution do not; and therefore if the party is in execution, he continues in execution, until he ſatisfies the end thereof, which is the payment of the ſum of money, for which the judgment and execution was againſt him. I cannot find a caſe on that point on a writ of *ca. ſa.* but there is a very material caſe, 1 *Salk.* 322. *Clark* v. *Withers*, which is a determination, that a writ of *fi. fa.* does not abate by death of plaintiff between the iſſuing and return of it, and that if the execution is begun, which is always begun by lodging the writ in the ſheriff's hands (an alteration from the common law made by the ſtatute of frauds; for before it was an attaching on the goods by the *teſte* of it) it does not abate, then conſider, how far this goes. So far that an execution does not abate by death of plaintiff, for whoſe benefit it is, after it is ſued out. How does that hold on a *ca. ſa.* on a judgment? Juſt in the ſame manner, and it has been often determined, that where there is an execution by *ca. ſa. Teſte* the laſt day of *Trinity term*, the party dies between that day and the return, which is the firſt day of *Michaelmas* term, and defendant is taken after his death; that is a good execution; which ſhews, the death of the party does not determine it. Then conſider what the effect will be, where the execution is compleated. If there is a *ca. ſa.* on a judgment, defendant is taken and in cuſtody; ſuppoſe the writ returned; plaintiff dies, the effect will be nothing at all; it does not abate the judicial writ according to *Sal.* the return of the ſheriff is, that he has taken the body, and has it ready to ſatisfy plaintiff. In conſequence of that I am of opinion, the executor or adminiſtrator of that plaintiff without any new proceſs has a right to this new demand, and defendant muſt lie in execution, until he has ſatisfied him. For as the intereſt of the judgment goes to the executor or adminiſtrator ſo on the impriſonment of the body of the defendant by virtue of the *ca. ſa.* which is an execution compleated, the benefit and intereſt of that pledge (as it is now by the rule of law according to *Hobart*, though *Coke* held otherwiſe, and to ſettle the difference between two ſuch great men at laſt the law was determined by act of parliament 21 *J.* 1. that it is a pledge) veſts in the executor or adminiſtrator, and defendant has nothing to do but to ſay, he will pay the money, and deſire to be diſcharged. Thus far I will go, though I cannot cite caſes for it, that if no executor or adminiſtrator appears, as if he has died without a will (for if he has made a will, though not proved, an executor may certainly receive the money, and releaſe before probat) but if he has died inteſtate, and no body will take out adminiſtration, I am of opinion, that defendant being in cuſtody might make a ſpecial motion to the court on notice to the next of kin, repreſenting to the court that he was in cuſtody, and ready to pay the debt; and if the next of kin would not take out adminiſtration in reaſonable

able time, the court would find means to relieve him according to equitable rules? But this would be the rule at common law; and the ground of it is, that it is a thing veſted, going to the executor or adminiſtrator, the party being in cuſtody for the very duty for which the judgment was given, and the executor or adminiſtrator, for whoſe benefit the ſheriff has his body, has a right to detain him without new proceſs. But the next conſideration is, how this is to be applied to proceſs of contempt out of this court, after a decree, in nature of an execution? I am of opinion, there will be a difference. In this caſe plaintiff is in cuſtody on proceſs of contempt under a decree for coſts on diſmiſſion of the bill, but I do not think, that will differ from the caſe of a defendant in cuſtody; for where the court gives coſts againſt plaintiff, that defendant is in nature of a plaintiff. But a difference will ariſe on the nature and foundation of the proceſs; which is always by way of proceſs for contempt, not for a debt or duty to have the body here to ſatisfy that; but all for a contempt in not obeying the order and decree of the King's court. Conſider it therefore in caſe of ſequeſtration, which is the neareſt to a *fi. fa.* that can be; though perhaps more analogous to a *cap' utlagatum*, but it is often compared to a *fi. fa.* If a ſequeſtration iſſues for a duty decreed, or coſts, and the party dies, that ſequeſtration muſt be revived, as I take it; and ſo it was done in *Wharam* v. *Broughton*; the reaſon is, becauſe the proceſs is for contempt, and that proceſs muſt die with the perſon. This differs it from the *fi. fa.* in *Sal.* which was held ſhould go on, though the party dies before it is compleated. If therefore it is to be compared to a *fi. fa.* throughout, that ſequeſtration muſt ſubſiſt on the goods of the defendant according to that caſe in *Sal.* until the whole ſum is levied, but that is contrary to the eſtabliſhed rule of the court. For if the party dies it muſt be revived, otherwiſe he is to be diſcharged out of cuſtody. The method in that caſe is, that the court will not immediately turn the ſequeſtrators out of poſſeſſion, but give time to revive that ſequeſtration in a reaſonable time; and if that is ſo in caſe of ſequeſtration, how ought it to be in proceſs of contempt againſt the body of plaintiff for coſts decreed to defendant? Is the plaintiff who is now the debtor, to be kept in cuſtody on the proceſs ſued out by the original defendant? Notwithſtanding his death, I am of opinion he is not, on this difference taken between the ground of an execution in this court and a court of law, becauſe this is in execution merely for contempt, which proceſs falls with the perſon ſuing it out, unleſs ſome method is taken to revive it: whereas at common law it is an execution in *rem*, or if in *perſonam*, it is for payment of the duty, but neither is he immediately to be diſcharged, and therefore the like method is to be taken as in caſe of ſequeſtration, that unleſs revived in a reaſonable time by the repreſentatives of the party dying, he muſt be diſcharged.

Ante.

Johnſon *verſus* Peek, *July* 1752. Caſe 158.

A Motion was made at the deſire, as was ſaid, of the Maſter of the *Rolls* to have it moved as ſoon as *Lord Chancellor* ſhould have given his opinion in the above caſe. It was, that the cauſe, which had abated by marriage of a *feme* plaintiff, might ſtand revived.

The plaintiff came only to revive in reſpect of coſts, which were unliquidated and due to plaintiff.

Lord Chancellor having ordered the decree to be read, ſaid, this was a decree out of aſſets of teſtator; which was an executory decree, ſomething was to be done; and therefore there might be a revivor for the whole, though the coſts not taxed at all. It has been the rule, though a very ſtrict and hard rule to be ſure, that if a man, to whom coſts are decreed, eſpecially in this court, where coſts are ſometimes very conſiderable, happens to die, and the ſuit abates, there ſhould not be a revivor, becauſe the coſts were not taxed. Perhaps it was too ſtrong a diſtinction, and too much weight laid on it originally; and therefore the court has always endeavoured to get out of it, ſo as always to hold, that if any thing remains executory in the decree, beſides payment of coſts, the party might revive though not taxed; and that would carry revivor for coſts along with it. Now this is a decree out of aſſets, and though the court has not gone on and directed, as it ſhould have done, that if aſſets are not admitted, they ſhould go on and take the account, the court would ſupply that on petition. An account of theſe aſſets muſt be taken; and on that diſtinction the ſuit ought to be revived.

It was urged that the account of aſſets was but incident to the right of the coſts.

LORD CHANCELLOR.

Suppoſe defendant whether executor or adminiſtrator had died, the coſts not being decreed againſt him perſonally, but as a debt on teſtator's or inteſtate's eſtate (for ſo it is taken) why might not that be revived againſt the adminiſtrator *de bonis non*?

Case 159. Taner *verſus* Ivie, *July* 27, 1752.

Prochein Amy allowed coſts on diſmiſſing infant's bill.

PETITION to be allowed coſts paid on the part of the *Prochein Amy* on the diſmiſſion of the infant's bill with coſts.

A bill had been brought for account of the eſtate of —— *Ivie*, which ſtood out on ſeveral ſecurities; the common decree was made; a receiver appointed; and an account to be taken of debts, and of what the truſtee received out of the eſtate. An order was obtained, that the Maſter ſhould look into the examination of the executor *Berry*, defendant in that ſuit, to ſee what money he had in his hands. That order produced a report, by which it appeared, that *Berry* had received money on a mortgage of *Wiginton* and ſeveral other ſums. Application was made to direct him to pay thoſe ſeveral ſums. The court directed him to pay 1000 *l.* not all that he had charged himſelf with. *Berry* was then taken to be ſolvent and in good circumſtances, but after his death appeared to be inſolvent. A ſupplemental bill was then filed againſt *Hull*, to whom *Berry* had aſſigned the ſaid mortgage, (which he had as executor of *Ivie*) in 1738, in order to make *Hull* liable to this ſum upon the tranſaction between him and *Berry*. After an anſwer was put in, there was an application to refer it to a Maſter to inquire, whether it was for benefit of the infant to proceed in that ſuit? The Maſter reported, that it would be for his benefit to carry it on againſt all the defendants. It was brought to a hearing in *July* 1746, and diſmiſſed as to *Hull* with coſts: the coſts were paid by *Leigh*, the receiver, on the part of the *Prochein Amy*.

To have theſe coſts allowed out of the infant's eſtate was this petition preferred; for that notwithſtanding the determination, the *Prochein Amy* had not miſbehaved in carrying on that ſuit; for it was at that time very doubtful matter, whether the ſpecifick aſſets of teſtator, applied (as this was) by the executor, could be followed into the hands of the aſſignee of that executor; and therefore very proper to have the judgment of the court upon it: though the judgment was, that it could not be ſo followed, that ought not to turn the coſts upon the *Prochein Amy*, and make him pay them out of his own pocket. It would be very dangerous to do that, wherever the *Prochein Amy* did not ſucceed in the ſuit, and render it impoſſible to recover debts for infants. *Your Lordſhip*'s judgment in 1746 was grounded on two determinations by *Your Lordſhip* not long before. The firſt was *Nugent*

gent v. *Giffard*.* The other *The Executors of the late Duke of Buckingham* v. *Mead the Banker*; where an aſſignment of a mortgage, part of the eſtate of old *Mead* (to whom young *Mead* was executor) was taken as a ſecurity for the young Duke, for his duly accounting. He did not duly account; but died in debt. The whole queſtion was, whether an executor could ſo as to make the aſſignee ſecure aſſign part of the ſpecifick eſtate of teſtator to purpoſes, which on the face of them did not ſeem to be any part of the truſt of the will; for after *Nugent* v. *Giffard* it was too ſtrong to argue, that an executor could not raiſe money on it, and apply that money afterward: but a difference was inſiſted on, where the executor did not receive the money, but paid it off himſelf; *Your Lordſhip* held, and for the ſake of convenience, that there was little difference between an executor's receiving the money and being intruſted with applying it as he pleaſed, or actually paying it off himſelf. Conſiſtent with theſe determinations *Your Lordſhip* could not determine otherwiſe in the preſent caſe, as it ſettled a point that was unſettled before: and therefore it is a proper ſuit to be carried on.

* Cited ante in Jacomb v. Harwood.

Againſt this it was inſiſted for plaintiff, that by the event of the ſuit againſt *Hull* and other circumſtances antecedent it was a frivolous ſuit: diſmiſſing the bill proves no probable cauſe of litigation. It is a general rule, that *Prochein Amy* ſhall pay defendant coſts of diſmiſſing infant's bill: and though there may be an exception, it is dangerous to admit one, or to ſay that where the Maſter reports the ſuit to be for the infant's benefit, if it turns out otherwiſe, the infant ſhould bear the coſts. It muſt be a very ſpecial caſe to take it out of that rule. Notwithſtanding the order to ſee whether it was for the infant's benefit to carry it on, there was colluſion and concealment from the Maſter, of matters proper to be laid before him, which would have ſhewn the weakneſs of this demand: and there was lacheſs in carrying it on, ſo that it was ſet down to be heard at requeſt of defendant *Hull*.

LORD CHANCELLOR.

This is a very uncommon queſtion to come before the court, how far a *Prochein Amy* in a ſuit for an infant, which is carried on by approbation of the court, ſhall be charged with coſts in the event of that ſuit, or have an allowance for thoſe coſts againſt the infant. To be ſure the court ought to take care of infants, that they are not prejudiced by perſons debtors to their eſtates, or who have the management of their eſtates: but was the court to go by ſuch ſtrict rules as are now laid down for the plaintiff, who oppoſes this petition, it would be very dangerous to attempt the management of infants eſtates. They muſt act under great

degrees

degrees of uncertainty and under probabilities; and ſo muſt the Maſters, who cannot upon ſuch references to them hear the other ſide, againſt whom the bill is brought, but only judge on circumſtances *prima facie* whether it is reaſonable to carry on ſuch a ſuit for the infant. Application to refer to a Maſter is very common; a *Prochein Amy* will venture to bring a bill to ſee on what foot, the anſwer puts it: but after anſwer comes in, and that it will probably be attended with expence, then is that application made. Thus far it appears, care was taken by the *Prochein Amy*, that an order was obtained in that ſuit for the examination of *Berry*, before the general account on the report was obtained, to ſee what money was in his hands, and how far there was ground to direct him to pay money into court for the infant's benefit. I cannot ſay, the 1000*l.* the court directed him to pay, was merely on the foot of that mortgage in controverſy: nor know I, out of what the court extracted that 1000*l.* which was not particularly applied to any ſpecifick ſum, with which he had charged himſelf. It is material, and has produced the preſent controverſy, that *Berry* was then in apparent good circumſtances; (nor is his credit impeached, ſo far as appears) but afterward that he died inſolvent, which occaſioned the ſupplemental bill; and that might be very reaſonable; for before his death there was no reaſon to look farther: but after his inſolvency it was reaſonable for the receiver and thoſe concerned for the infant to ſee the tranſaction of that mortgage, and whether there was any other perſon, whom they could charge with this ſum in aid of the infant's eſtate. As to the grounds inſiſted upon to ſhew the coſts ought to be born by the *Prochein Amy* or the receiver, who ſwears, he paid them for the *Prochein Amy*, the diſmiſſing the bill with coſts as againſt *Hull* does not prove, that there was not a probable cauſe of litigating; for *Hull* being a mortgagee and real creditor, and brought before the court to have his ſecurity impeached, if the bill is diſmiſſed, there is hardly an inſtance, in which it is not with coſts; for being brought before the court without juſt grounds, the court would not do him juſtice, unleſs coſts were given to him, as he is a creditor and incumbrancer. The court does not in that caſe inquire, whether there was probable cauſe of litigating. It is a different queſtion between the *Prochein Amy* and the infant, in whoſe behalf he has brought the ſuit; for then the queſtion is, whether he was ſufficiently warranted to bring it; whether it was brought and carried on in a reaſonable manner, and without lacheſs; for if ſo, the infant ought to reimburſe him in that ſuit, eſpecially in a caſe of this kind where every thing as to the account and management of the infant's eſtate was under the direction of the court. As to the colluſion and concealment mentioned, it is a ſufficient anſwer thereto, that this matter was referred to the very

ſame Maſter, before whom the account was, and before whom *Berry* admitted this ſum to be in his hands. If there is colluſion between an executor and another perſon, as to playing over part of teſtator's eſtate into the hands of that other, both would be liable to make ſatisfaction; but at the hearing no ſuch fraud or colluſion was made out, as was ſufficient to charge *Hull* and make him anſwerable; which was the ground of my determination; not upon any general principle that an aſſignee or perſon taking ſecurity of an eſtate from an executor is not to be anſwerable. I do not know, that there can be any ſuch principle in theſe caſes; they all depend on circumſtances; and therefore my determination in *Nugent* v. *Giffard* was grounded on a caſe in *Vernon* in Lord *Cowper*'s time, where the court had in their decree ſaid, that contrivance appeared between the executor and aſſignee of the mortgage to make a *devaſtavit*; and wherever ſuch contrivance appeared, notwithſtanding any of thoſe determinations, the court would hold the aſſignee liable. But I was not ſatisfied in *Nugent* v. *Giffard*, that there was ſufficient evidence to come up to the ground of Lord *Cowper*'s determination; nor was there in the preſent caſe. Next there does not appear any lacheſs or miſbehaviour in carrying on the ſuit: its being heard on requeſt of the defendant is no proof thereof; for that they could not help; and might not upon further enquiry chuſe to bring it on themſelves. The ground of the proceeding againſt *Hull* plainly aroſe after that report from the inſolvency of *Berry*. They have done nothing, but what a man would do in his own caſe: and though it has turned out unfortunately, the court will not ſay, they ought to bear the coſts. The Maſter upon thoſe references to inquire does not perhaps look ſo far, as he ought, and reports it a proper ſuit; that is not a reaſon, if afterward found improper, to make the *Prochein Amy* pay the coſts. I have known bills to eſtabliſh the cuſtom of manors: It has been referred to a Maſter to inquire, whether it was for infant's benefit to carry it on: the Maſter can go only upon probabilities; nothing is ſo uncertain as the evidence of ſuch cuſtoms: that bill may be diſmiſſed. If it ſhall be ſaid, that the receiver and *Prochein Amy* ſhall bear the coſts of it, nobody would undertake the management of ſuch an eſtate of an infant. The petitioner therefore ought to be allowed this.

Aſſignee of executor not liable, unleſs colluſion.

Caſe 160. Champ *verſus* Moody, *July* 28, 1752.

LORD CHANCELLOR.

Intereſt not commonly reſerved under general directions, unleſs after trial at law.

RESERVATION of further directions in general has not been taken to reſerve intereſt; and intereſt ought to be expreſsly directed by the decree to be reſerved. I do not ſay, but there may be a caſe, where it has been pointed out in the cauſe, perhaps the court would take intereſt to be reſerved on ſuch general directions. After a direction of a trial at law reſervation of general directions will be taken to include coſts, intereſt, and every thing: but in the common caſe of reference to a Maſter it is taken to be otherwiſe. The reaſon I take to be, that the queſtion of intereſt ſhould be pointed out to the Maſter, that he may have notice and attention to that Matter ſo reſerved, that his report may be adapted to it.

Caſe 161. Ex Parte Watkins, *July* 29, 1752.

Guardian.

PETITION that the court ſhould appoint a guardian of the perſonal eſtate of *Anne Watkins*.

A Petition may be without bill filed: there is no perſon before the court who has any legal right; no teſtamentary guardian ſo as to be valid; neither father or mother. The governor of the *Leward Iſlands* appointed a guardian; but that fails, as ſoon as the infant came to *England*. An inſtrument is ſet up, by which the infant names a guardian: but the infant, though fourteen, has no right to do ſo, becauſe ſhe has no *ſocage* lands. If ſhe had, the court would not ſuffer the infant to be bound by ſuch an act, but turn it rather the other way; as held lately by *His Lordſhip* in the caſe of Mr. *Lockyer*, who of the age of eighteen had appointed a guardian under his hand. If then no legal right, it devolves on the court, which can now appoint, the infant being reſident here. The application is made to avoid expence; and the queſtion is, which of the parties applying is fitteſt?

LORD CHANCELLOR.

It is not proper for me to determine; it muſt go to the Maſter.

Bickham

Bickham *verſus* Croſs, *July* 29, 1752. Caſe 162.

ON petition, the queſtion was, whether intereſt ſhould be carried on upon the whole ſum reported due for principal, intereſt, and coſts?

See 4. Bro. Cha. Cas. 157. 2. Ves. Jun. 157. also. See further 3. Ves. Jun. 557.

Lord Chancellor ſaid, there was no inſtance of the court's computing intereſt on coſts except as to a mortgage. It was certainly the ſtrict rule of the court, that where mortgagor came to redeem, and mortgagee to foreclоſe, and afterward there is a report computing what is due for principal, intereſt, and coſts, all that is conſidered, as one accumulated, conſolidated, ſum; and if the court enlarges the time, and it goes back to the Maſter to compute ſubſequent intereſt and coſts, the Maſter reports the ſubſequent intereſt on the whole ſum. The ground of that he took to be, that the mortgaged eſtate is a pledge for the money. The court gives relief contrary to the rule of law, (for at law it is abſolute) and can do it on ſuch terms, as the court thinks fit. If a perſon comes for enlargement of time, that is a favour, granted by the court not only beyond what the law, but beyond what the decree allows; and computation of intereſt ſhall be for the whole: but in ſeveral other caſes, as ſuppoſe it was on a perſonal demand, as on a bond, to be relieved againſt the penalty, and that on payment of principal, intereſt, and coſts, there ſhould be relief, and afterward there is ſubſequent intereſt, he did not know, that the court carries on the ſubſequent intereſt on the whole ſum reported due for principal, intereſt, and coſts. In other caſes it happens more frequently; as on an account taken, and for performance of a truſt decreed, a general report is made by the Maſter of what is due to creditors, and creditors are of a different nature; they afterward come for a ſubſequent computation of intereſt; he took it, that the Maſter does not carry the ſubſequent computation upon the whole. He very well knew, that if ſome of theſe creditors are mortgagees, and they come to the court for a ſeparate report, the court ſometimes puts it on them to conſent, that notwithſtanding the ſeparate report that ſhall not carry intereſt on the whole ſum: but did not know, that the court puts theſe terms on other creditors except mortgagees. In performance of the truſt of a real eſtate, where ſeveral debts are to be preferred, this muſt have occurred in ſeveral inſtances. The court only directs ſubſequent intereſt to be carried on, and leaves it to the Maſter, except as to mortgagees, in which the compound ſum always carries intereſt: yet the court always conſidered that as in their diſcretion: and

Intereſt computed on coſts.

that diſcretion introduced, what he did ſome time ago as to the variation of intereſt.

Ante Aſtley v. Powis, 1750.

But it being apprehended that the practice was to compute intereſt on the whole ſum, *His Lordſhip* ſaid, he would conſider in what manner the ſubſequent intereſt ſhould be carried on; and afterward (as I was informed) directed it to be carried on the whole ſum.

Caſe 163. Earl of Pomfret *verſus* Lord Windſor, *July* 30, 1752.

L. C. Jewell's Mſs. N.° 6. fo. 69.

Vide Earl of Portmouth v. Vincent *Jew. Mſs. N.° 5. 217.*

Fine by perſons in poſſeſſion, and non-claim thereon, the legal eſtate being in truſtee, barred not an equitable charge under the deed of truſt, though after great length of time.

See 2 L. Cas. Ch. 60. S. C. 1 Vern. 144. 2 Vern. 109. & 368.

THE end of the bill was in right of Lady *Pomfret*, plaintiff's wife, to have a general account of the perſonal eſtate of her father *John* Lord *Jefferies*, and, as connected with that, to have an execution of a truſt for raiſing 20,000*l.* out of a real eſtate, which when raiſed was by that truſt and a private act of parliament paſſed on it to become part of the perſonal eſtate of Lord *Jefferies*.

The material facts conſtituting the caſe, on which the plaintiff's demand aroſe, were, that Lord *Jefferies* before the revolution intermarried with Lady *Pomfret*'s mother, ſole daughter and heir of *Philip* Earl of *Pembroke*, and in that right was intitled to a very great real eſtate in ſeveral counties. It did not appear, nor was it alleged throughout the cauſe, that on the marriage any ſettlement or articles were entered into, but after the marriage things ſtood in the ſame way until 1697, when the truſt, upon which the valuable part of the plaintiff's demand aroſe, was created; and then the family took it into conſideration to make mutual ſettlements; by one of which Lord *Jefferies* was to make a ſettlement of a real eſtate and jointure for his wife, and on the other ſide ſhe was to make a ſettlement of her eſtate, by which in default of iſſue ſtill ſhe would be miſtreſs of it, but to be charged with 20,000*l.* to be raiſed out of that eſtate in nature of a portion Lord *Jefferies* was to have with her, but to be applied to particular truſts. By that ſettlement by Lady *Jefferies* three eſtates in *Monmouth*, *Wilts*, and *Glamorgan*, were conveyed nominally: but the *Wiltſhire* eſtate was not material to the preſent conſideration, the family never being in poſſeſſion or claiming any part of it, going along with the male branch of the *Pembroke* family: ſo that this was to be conſidered as a conveyance only of the other two eſtates, as it was in effect. They were thereby conveyed to three truſtees in fee, of whom Sir *John Trevor* was one. The firſt truſt was on the *Monmouth* eſtate to ſell it with all convenient ſpeed,

ſpeed, and by the money ariſing and by the rents and profits until ſale they were to purchaſe in an annuity, if the premiſes appeared to be charged therewith; and then to pay off portions with which the premiſes ſhould appear charged; then to pay off the debts of Lord *Pembroke*; and afterward to raiſe 20,000*l.* as and for the portion of Lady *Jefferies* and for the uſe and benefit of Lord *Jefferies* in manner following: firſt to be applied to clear the lands ſettled in jointure on Lady *Jefferies*, and particularly a mortgage which was on that eſtate, made by *Lord Chancellor Jefferies*: and out of the reſidue of it they were, if they thought fit, to pay any charge for portions or maintenances of the ſiſters of Lord *Jefferies* or other incumbrancers: but there was a direction, that they ſhould not be compelled to pay off the ſaid portions and maintenances, unleſs they thought fit: and after payment of the ſaid mortgage-money and of the portions and maintenances, if they thought fit to pay them, the ſurplus to Lord *Jefferies*, his executors, adminiſtrators, and aſſigns. Then a direction how the reſidue of the *Monmouth* eſtate was to be ſettled. Afterward the truſt was declared of the *Wiltſhire* eſtate, ſuppoſed to belong to them: but it was entirely left to the diſcretion of the truſtees, whether they would make any uſe thereof, and to which they were not to be compelled in a Court of Equity or otherwiſe. The next truſt was as to the *Glamorgan* eſtate, now in queſtion, to ſell it, and with the money ariſing and the rents and profits until ſale to raiſe 4,000*l.* of which 1,000*l.* to was be paid to Lord *Jefferies* himſelf; 3,000*l.* to his wife to her ſeparate uſe, or of ſuch perſon as ſhe ſhould appoint; and next that if the money ariſing by ſale of the *Monmouth* eſtate, and alſo of the *Wiltſhire* eſtate if they thought fit to uſe it, ſhould not be ſufficient to raiſe the 20,000*l.* then the truſtees ſhould out of the *Glamorgan* eſtate raiſe ſo much, as ſhould not be raiſed by ſale of the others: and when this 20,000*l.* was made up, there was to be an end of this truſt.

After the execution of this deed they had iſſue a daughter in 1698. In 1702 Lord *Jefferies* died inteſtate. His widow took adminiſtration, and ſoon after in 1703 intermarried with *Thomas* Lord *Windſor*; who thereby ſtood in her place as to the adminiſtration of Lord *Jefferies*'s eſtate and the powers over that eſtate, and alſo came into poſſeſſion of ſuch real eſtate, as ſhe was intitled to; which was the whole of her real eſtate ſubject as to thoſe charges, as Lord *Jefferies* died without iſſue male; and alſo had the power of guardianſhip of the infant, then of very tender years, and the management of her affairs.

Soon after this marriage in 1703, Lord *Windſor* levied a fine of the wife's whole eſtate, particularly of thoſe eſtates ſubject to the

truſt of the deed of 1697, they being in poſſeſſion of the eſtate, and having continued in poſſeſſion in her right from the death of Lord *Jefferies*. The uſes of that fine were declared to Lord *Windſor* and his heirs.

Two bills were brought for demands out of Lord *Jefferies*'s eſtate, and debts which he owed. A private act of parliament was obtained in 1708, which related to ſeveral matters; the principal and longeſt part to the eſtate of *Lord Chancellor Jefferies*: but it alſo took up the conſideration of the truſt of the eſtates, created by the deed in 1697, which deed is particularly recited in the act: and there was this clauſe therein, that for preventing all controverſies as to this 20,000*l.* it was declared and enacted, that it ſhall be taken to be part of the perſonal aſſets of Lord *Jefferies*, and liable to pay his debts, and to reimburſe Lady *Windſor* two ſums which ſhe allowed and deducted out of the value of her jointure toward diſcharging a mortgage made by *Lord Chancellor Jefferies*, and portions and maintenances, and the ſurplus to be diſtributable according to the ſtat. of diſtribution.

After this the creditors of Lord *Jefferies* brought on their bill to a hearing in 1712; when a decree was made by Lord *Harcourt* in this manner; to refer to the Maſter to take an account of the debts due to the creditors of Lord *Jefferies*, and tax their coſts; and in order to the diſtribution of the 20,000*l.* according to the act of parliament it is ordered and decreed, that ſo much of the ſaid truſt eſtate, as ſhall be ſufficient to raiſe the ſaid 20,000*l.* be ſold to the beſt purchaſer, and the truſtees are to execute their truſt by making ſuch ſale, and the defendants Lord *Windſor* and his wife to join therein; and out of the money the wife firſt to be paid before all the creditors thoſe two ſums mentioned in the act, and next the creditors their ſeveral demands reſpectively; and afterward it is ordered and decreed, that the reſt of the ſaid ſum be diſtributable according to the ſtat. of diſtribution; and the defendant Lord *Windſor* being in right of his wife intitled to one-third of the reſidue, let that be paid to him; and the daughter and only child of Lord *Jefferies* being intitled to the other two-thirds, and being an infant, let the ſaid two-thirds be brought before the Maſter to be put out at intereſt for the benefit of the infant; and let the defendant Sir *John Trevor*, who has in ſeveral tranſactions taken care of the infant's concerns, have notice, when the Maſter is to be attended by the creditors, and for placing out the money; and that Lord *Windſor* come to an account for the perſonal eſtate of Lord *Jefferies*.

A report was made in 1714, by which it appeared, that the directions in the decree were not in the leaſt purſued; and Lord *Windſor* ſtood out proceſs to ſequeſtration, which iſſued againſt him for the production of the deeds and writings of the eſtate. In 1717. Sir *John Trevor* died. In 1719. the infant attained her age, and in 1720. intermarried with the plaintiff. After this it did not appear, that any care was taken as to the proceedings in thoſe cauſes: but Lord *Windſor* continued to pay the debts of Lord *Jefferies* in the country and in a private manner: nor was any account as to this laid before the plaintiffs on their marriage. In 1729. Lord *Windſor* mortgaged this *Glamorgan* eſtate to *Benjamin Hoare*. In 1733. Lady *Windſor* died. In 1738. Lord *Windſor* died, having by his will created a truſt upon his real eſtate for payment of debts, and made his ſon, the defendant, executor; who upon the ſale of this *Glamorgan* eſtate under that truſt created by Lord *Windſor*, purchaſed it. There was after this an intercourſe of letters between the defendant and the plaintiffs and the ſolicitor of the plaintiffs: but the bill was not filed until 1746.

For plaintiffs. It is ſeldom, that a demand at this diſtance is ſo well eſtabliſhed. It is a good demand under the deed, as part of the effects of Lord *Jefferies*, purchaſer of it under a ſettlement: but afterward eſtabliſhed both by the act of parliament and decree. There are four general objections. Firſt that the fine and five years nonclaim are by the ſtatute of fines an abſolute bar: but conſidering it firſt as a fine to operate in point of law, and as if now argued in a court of law, it is null and void, and never affected the legal eſtate in the truſtees. If one, after notoriouſly turned out of poſſeſſion, will continue ſo long without aſſerting his right, he ſhall be barred: but he muſt be turned out of poſſeſſion, deveſted, or put to a right, ſo as to be called on to bring his action. Therefore no fine by tenant for years, life, copy, or will, the rent being paid all the while, will bar the landlord. So where privity of eſtate; as in tenant for life, remainder for life, tenant in tail remainder in tail, the poſſeſſion is in privity. Then the poſſeſſion of Lord and Lady *Windſor* is the poſſeſſion of the truſtees, and would be ſo in point of law. They come in in privity, and are allowed to have poſſeſſion of the eſtate by permiſſion of the truſtees, whoſe duty it was to permit them; ſo that at law they were only tenants at will to the truſtees, and have done no act to diſaffirm the title of the truſtees: it is incident to all mortgages to let mortgagor continue in poſſeſſion as long as intereſt is paid; and no fine can bar mortgagee, becauſe mortgagor muſt be conſidered as tenant at will to him, and in privity of eſtate. Lady *Jefferies* was in effect mortgagor of this eſtate; for the deed was made to ſecure this debt of her's on the death of Lord *Jefferies*: ſhe continued in the ſame way, intitled to the

the equity of redemption and to the money arising from it; to one third in her own right, and to two thirds as truſtee for her daughter. The intent of this fine by her and her ſecond huſband was to put that equity, ſhe had in her own right, in him; a mere donation of her to him, who took it as a volunteer; and by his will ſpeaks ſo. Being an equitable intereſt it could not be conveyed to him but by fine; the deſign could not be anſwered otherwiſe. Then this fine cannot be now ſet up contrary to that deſign, and be ſaid to turn the truſtees eſtate to a right. The general rule of law is, that a fine operates according to intent of the parties, and not further. There is no evidence, that they meant a diſſeiſin of the truſtees: they all along aver the contrary, in their petition upon obtaining the act of parliament, in their anſwer to the creditor's bill; and both the legiſlature and decree conſidered it as a ſubſiſting, continuing, ſettlement, not as barred; and eſtabliſh it. Lord *Windſor*, as long as he could, kept off the ſale of this eſtate decreed, as knowing that the reſidue after payment of the creditors would be brought into court for the infant's benefit. The court directed a receiver: this fine then muſt be a diſſeiſin of the court; muſt run againſt that poſſeſſion, the court had for benefit of the infant; like the late caſe of Lord *Portſmouth* v. *Vincent*, where an eſtate was ſtolen out of poſſeſſion of the court, and a fine and length of time, 38 years of poſſeſſion, inſiſted upon: *Your Lordſhip* held, it ſhould not bar, being founded in fraud; and that is another ground to ſet aſide this fine in a court of law, that it is covinous to defeat this ſettlement. *Farmer*'s caſe. If there ſhould be any doubt in a court of law, there is none in equity. Truſtee cannot levy a fine to defeat *ceſtuy que truſt*; for every one in poſſeſſion with notice of the truſt is a truſtee; and *ceſtuy que truſt* has nothing to do with the poſſeſſion: but it may be reſted on this, that in point of law it is no bar; for they were in poſſeſſion in privity of this deed. No one can be diſſeiſor, who comes in in privity of another. It is a maxim of the *Roman* law, that none can change the cauſe of his poſſeſſion; becauſe it is a fraud; does not give the rightful owner notice; and if the parties at time of the fine had nothing, being only tenants at will to the legal owners, it is void, and cannot after be made good, *Saffin*'s caſe, though a voidable act may. The ſecond general objection is the diſtance or length of time at which this demand is made, whether, laying the fine out of the caſe, that is any bar by any poſitive rule of law. No ſtatute of limitations extends to it: the legal eſtate remains ſtill in the heir of the truſtee, who cannot keep it. The court muſt ſay on what terms, that muſt come out of him; which cannot be without ſatisfying theſe truſts. The firſt view, in which length of time may be of weight, is, where it furniſhes preſumptive evidence of ſatisfaction. It never pays a debt: but will in many caſes preſume payment: as where no demand is made on a bond for eighteen years, a jury will preſume

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ſume payment. So of a legacy, and the acquieſcence not being accounted for, this court will preſume: which will ſtand until the contrary appears. If there is any appearance of this debt being paid, length of time would have great weight; but there is no ſuggeſtion of it: not ſo much as a belief formed. The late *Maſter of the Rolls* ſaid, that where defendant inſiſted on length of time, but could not form a belief whether it was paid or not, the court would not form a belief of it. It is indeed long, ſince Lady *Pomfret* came of age; but ſeveral accidents ſince account for it: no care was taken from Sir *John Trevor*'s death. Until 1736. ſhe had no notice of this demand. The plaintiffs then went abroad for above three years; during which and ever ſince it has been under treaty. A ſecond view, in which length of time may be material, is, where it would lay the parties, againſt whom the demand is made, under great difficulties; but with this reſtriction (which is a third view) to whoſe fault the acquieſcence is owing: for the party cannot benefit himſelf by that acquieſcence, into which he unjuſtly deceives another. If ſome hardſhips were to fall on the defendants by this length of time, it was owing to the miſbehaviour of Lord *Windſor*. The third general objection, in which all the defendants are concerned, is as to the intereſt, the rate and from what time. It will clearly follow the principal, as a ſatisfaction for detention of the demand, a charge by way of portion on a real eſtate, out of which it is payable and to be raiſed immediately. Then until raiſed, Lord *Windſor*, who received the benefit, muſt pay the intereſt. The land is the debtor; the perſonal eſtate of Lord *Jefferies* the creditor. A charge of a preciſe ſum on land carries intereſt always. From the report the reſidue of the 20,000*l.* became liquidated: but it ought to carry it from the act of parliament or decree; and not leſs than the preſent legal rate. The next head of objections are thoſe peculiar to ſome of the defendants; which, if good, will cover the whole of theſe aſſets from this demand. The firſt is by the repreſentatives of *Hoare*, whether they have a right in this court to have his mortgage preferred to the plaintiff's demand? They have no legal eſtate in them nor in any truſtee for them. Then having nothing but an equity as well as the plaintiffs, the court muſt decree according to the prior equity. But if they had the legal eſtate, they had notice, and ſo muſt become truſtees. Perhaps the act of parliament, becauſe private, may not be notice: but there is a decree, which has been determined to be notice. 2 *C. C.* 48. A ſuit in equity is ſuch a *lis pendens* as to affect all mankind; which, though a hard rule, holds, becauſe it is otherwiſe impoſſible to come at juſtice. Then a decree, which is to be carried into execution, is fuller notice than a ſuit. But if there was not this conſtructive, there is actual, notice; as notice to the ſolicitor or perſon tranſacting always is as well as to the party himſelf; and that would appear, if they produce the copy of this deed in 1697. and the ab-

ſtract of the title-deeds of this eſtate; which the repreſentatives of *Hoare* admit, they found in his cuſtody, and that they were laid before his counſel. If they do not produce, notice, which is charged, will be preſumed. That is the conſtant rule; and has been ſo ruled by Lord *Chief Baron* at *Niſi prius* upon the not producing ſhop-books. Next as to *Clavering*'s mortgage made afterward by Lord *Windſor*, the eſtate is thereby taken ſubject to *Hoare*'s mortgage expreſſly: nor have they a legal eſtate of any ſort, not even under this colourable fine, but take a mere equity. Another particular defence is by Lord *Windſor* as purchaſer of the *Glamorgan* eſtate: but whether or no that was fair and for a full price, he had undoubtedly notice.

For defendants. Defendants admit, this was originally part of the perſonal eſtate of Lord *Jefferies*; but inſiſt on plaintiffs ſhewing, that this reſidue of it ſtill remains not applied in a courſe of adminiſtration to anſwer prior demands; for if thoſe are ſufficient to exhauſt the whole, the plaintiffs have no right. Courts of equity diſcountenance ſuits for old, ſtale accounts. Preſumption from length of time is uſed by the law for the ſake of publick peace and quiet, (which is the ground of the ſtatute of limitations), and that otherwiſe it were to do juſtice but by hazard, eſpecially here where the ſum is not ſpecifick or liquidated. On theſe two principles are bonds, legacies, and judgments preſumed paid, mortgages ſatisfied, and ſo the whole equity of redemption and right to an eſtate is given up after letting mortgagee continue in poſſeſſion twenty years. Length of time will preſume a fine, recovery, tenant to *præcipe*, or even an act of parliament, and deeds to be executed. A merchant here ſends over to his correſpondent an account; if not objected to, it is preſumed right. In conveyances of real eſtates after twenty-five years livery of ſeiſin is preſumed. There is a bar from a poſitive rule of law, conſidering it as an action of account which muſt be within ſix years after infant attains his age. *Eq. Ab.* 304. The queſtion is not, whether the plaintiffs have not ſatisfied this demand, but whether this 20,000*l.* has not been ſatisfied in the way it ought; for then the plaintiffs have no demand, and length of time will preſume it properly adminiſtered. Lady *Pomfret* muſt have had notice of this ſettlement: this is not a caſe, in which defendants are to prove notice. Lord *Windſor* might pay the debts without ſelling the eſtate; and it cannot be thence inferred, that endeavours were uſed to prevent her from knowing her right. The next defence is from the effect of the fine levied upon her thinking proper to ſettle this eſtate on her huſband, and of the nonclaim. It is ſaid to be no bar, becauſe this is a truſt. It would be laying down the rule too general to ſay, a fine would not bar a truſt: ſuppoſe an eſtate in truſt for *A.* and his heirs, who is in poſſeſſion, and conveys to another for valuable conſideration:

tion: that other has only a mere truſt: a third perſon gets into poſſeſſion, and, while he enjoys it wrongfully twenty years, levies a fine: if he, who had the legal right originally, was to bring an action at law or ejectment, he could not recover. If he could, a fine would amount to little in moſt of theſe eſtates, which are purchaſed, as the legal eſtate often cannot be got in. Eſtates in truſt, as moſt in this kingdom are now, depend on poſſeſſion, which is good againſt the owner of the legal eſtate. So likewiſe as to any claims and charges out of the eſtate, which muſt alſo be barred. It is ſaid, a fine bars only according to the intent: but it may be uſed for every purpoſe to ſupport that, for which it was was levied. The breaking through this would break through all equitable fines, on which ſeveral eſtates are held. But though from the privity it ſhould not be a bar as to Lord and Lady *Windſor*, the ſubſequent purchaſers ſhall have the full operation of it, when they come in, and the nonclaim run from thence. The general principle, why a court of equity will not relieve againſt purchaſers for valuable conſideration, is not, becauſe they have the legal eſtate, but becauſe it will not for the ſake of another, who has no better equity, take away from him that, which he has equitably purchaſed. It is miſtaking the rule to ſay, the prior equity ſhall prevail; for the defendants are purchaſers for valuable conſideration, inſiſting that the plaintiffs have no right to come againſt them for aid in a court of equity; and if they had pleaded their purchaſes, the court would not inquire, whether or no they had the legal title, but whether the money was paid, *&c.* Notice is not to be preſumed, and is not ſhewn. If one directed to produce books, which will be evidence againſt him, will not, as he ought, the preſumption in a court of law will be againſt him: but that is not the caſe of purchaſers for valuable conſideration without notice, whom this court permits to conceal deeds and writings. It does not appear, when the copy and abſtract came into the cuſtody of *Hoare*; and it might be after his mortgage. The letters of the defendant Lord *Windſor* to the plaintiff and his ſolicitor, offering to come to an account and a reference, are no admiſſion. It only means to refer the determination of the bar from length of time. As to intereſt, this is a reſidue of perſonal eſtate and aſſets, which do not carry intereſt.

Evidence. Exhibits *viva voce* cannot be read, where there is a right to croſs examine.

Lord Chancellor allowed an objection made to the reading receipts, proved *viva voce* at the hearing, to ſhew certain debts of Lord *Jefferies* paid by Lord *Windſor*. On *plene adminiſtravit* the defendant muſt ſhew ſomething, that ſuch a debt was due; and perhaps after ſuch a diſtance of time antient receipts may be reaſonable evidence, that there was ſuch a debt: but as to proving exhibits *viva voce* it is a certain, eſtabliſhed rule, that you can only prove the hand-writing of the porſon to that exhibit or the hand-writing of the witneſs: but cannot enter into any examination whatever, that

that will admit of a croſs examination. Then ſuppoſing theſe receipts might be ſome evidence of a debt due from Lord *Jefferies*, as otherwiſe his repreſentatives would not pay the money, that is a fact, the plaintiffs ought to have liberty to controvert; and therefore it ought to be examined in a proper manner, where there may be that liberty; for ſuppoſe, the plaintiffs have a witneſs to prove, it was the debt of Lord *Windſor* or his wife, they could not call that witneſs here: therefore that very right, the plaintiffs have to controvert, and croſs examine, is an objection to the reading theſe *viva voce*: not but that Lord *Windſor* may have the benefit of them ſome way or other.

His Lordſhip took time to conſider of the cauſe; and ſaid, it was material to ſee certain fines ſaid to be levied; becauſe whoever claimed as purchaſers for valuable conſideration without notice, were not bound by the recital in the act of parliament, which was not a publick act to bind all mankind: and now delivered his opinion.

I directed this cauſe to ſtand over for judgment, not for any material doubt in my own mind concerning the juſtice of the caſe, but in ſome meaſure to give opportunity to the plaintiffs to ſupply a formality in evidence; and alſo as I ſaw the caſe attended with ſuch particular circumſtances, as would require ſome ſpecial direction to attain juſtice, which would require conſideration; and alſo as the cauſe conſiſts of a great variety of facts, ſome of which are not without intricacy.

The material part of the caſe ariſes on the deed of truſt in 1697, by which the truſtees have the inheritance in them. The truſts are declared dividedly and in a different manner: though they amount at laſt to the ſame purpoſe. The prior charges to the raiſing the 20,000*l.* are all uncertain and in the dark; and the truſtees had a diſcretion, if they thought fit, to exonerate Lady *Jefferies*'s jointure from thoſe charges. By the act of parliament this truſt is enacted to be carried into execution, and the money raiſed; and ſo it is ordered by the decree, which is a very uncommon one, and particular care taken in giving the directions.

Upon the ſtate of the caſe there are two general conſiderations.

Firſt the nature and original right of the plaintiff's demand; which is to be rather mentioned than conſidered, being as plain as can be, a bill for a common, ordinary, relief in equity by a child for an accoun of the perſonal eſtate of her father, and to have a diſtributive ſhare of it according to the ſtatute; and, as one part conſiſts of a truſt of a real eſtate, to call for an execution of that truſt.

But the material conſideration ariſes on the ſecond head, to be divided into ſeveral parts upon the objections and defences to this demand of which ſeveral kind are ſet up by way of bars.

Firſt all the defendants inſiſt on the fine and nonclaim, which has ariſen thereon: but I am of opinion, there is no colour for a bar from thence either in law or equity. Firſt, to take it as it ſtands at common law, it was a void fine; and any perſon might plead thereto, that *partes finis nihil habuerunt*; for after the ſecond marriage of Lady *Jefferies* they continued in poſſeſſion by permiſſion of the truſtees, who had undoubtedly the legal eſtate in them upon ſeveral truſts, particularly to raiſe this 20,000*l.* which was an incumbrance therefore on this eſtate. Then in point of law they were tenants at will to thoſe truſtees; and therefore the poſſeſſion of Lord and Lady *Windſor* after the marriage; and of her before the marriage, was the very poſſeſſion in conſideration of law of the truſtees. Then what do they do, being thus in poſſeſſion? They do no act to change the nature of it, but barely levy a fine: this then in conſideration of law is only a fine by tenants at will to the truſtees, and conſequently void according to all the determinations; as in *Farmer*'s caſe, 3 *Co.* *Saffin*'s caſe, 5 *Co.* This proves, they meant nothing by the fine but to paſs what they might; for if they meant a wrong thereby, they muſt have taken another method; as this could not work a diſſeiſin on the truſtees and turn their eſtate to a right, while they were tenants at will to the truſtees. This way indeed they might do it according to the diſtinction taken in ſeveral caſes, particularly in *Dormer* v. *Parkhurſt*, if they executed a feoffment on the land; becauſe it is a feoffment on livery, which is notoriety to the truſtees, and puts it on them to make entry to avoid: but that not being done, things were juſt as before: no eſtate was gained to them by wrong, nor the eſtate turned to a right. Beſide thoſe general caſes aforeſaid there is *Focus* v. *Saliſbury*, *Hard.* 400. in which the opinion of Lord *Hale* as to the privity between leſſor and leſſee, where the fine ſhould not bar, is very material to this, he comparing that caſe directly to a mortgage; and here is as much privity, as can be. This then has clearly no operation in point of law; and indeed the acts ſubſequent to the fine explain it to the contrary, and ſhew, it was not the intent of the parties to the fine to diſſeiſe or bar the truſtees, *viz.* the private act of parliament obtained after the fine by Lord and Lady *Windſor* for an execution of this truſt, and the decree in a ſuit to which they were parties, and did not complain thereof. All theſe caſes amount to the caſes put in *Farmer*'s caſe, where the paying the rent was held evidence of no diſſeiſin of the leſſor, as paying the rent admitted poſſeſſion of the leſſor. I agree to what the defendants inſiſt on, that the purchaſers coming in ſince ought to have the full benefit of the operation

Fine by tenant at will, void: no diſſeiſin. Otherwiſe of feoffment on livery.

of this fine: but they cannot have more than the operation of it. As this fine was a nullity at firſt, nothing ariſing from length of time can make it good; and nonclaim on a void fine amounts to nothing, has no effect at all. There is no difference in that reſpect from length of time: but in caſes where the fine was good in its original, and the parties to be barred by the fine have different times to enter, there is a prolongation of the fine for that purpoſe in the caſe of fines; as in a fine by tenant for life, which as ſoon as levied operates a forfeiture, and the remainder man or reverſioner may enter preſently, but is not bound ſo to do; and therefore the law gives him five years after death of the tenant for life, becauſe he has no reaſon to look until the natural determination of the eſtate: but I know no other caſes, in which the law will give different times of entry on nonclaim on the foot of fines. I will go ſtill farther: that if this had been a bar in point of law to all intents and purpoſes, it would be none in equity: my reaſon is this. Lord and Lady *Windſor* were in nature of mortgagors of this eſtate; continued in poſſeſſion juſt on the ſame foot as a mortgagor continues in poſſeſſion, before mortgagee enters, who may enter on him at any time. This incumbrance has the effect of a mortgage: then it is a certain doctrine in this court, that a fine by mortgagor in poſſeſſion, cannot bar mortgagee; and that is the caſe put before mentioned by *Hale*. The caſe of this fine is ſtill ſtronger than almoſt any, that can be put, for this particular reaſon; Lady *Windſor*, who levied the fine, was in the nature of truſtee of this very ſum of 20,000*l.* which was the charge; for executors and adminiſtrators to many purpoſes, though not to all, are in this court conſidered as truſtees. She was adminiſtratrix to her late huſband, and guardian to her infant daughter; both which capacities, the adminiſtratorſhip and more ſtrongly the guardianſhip, infer a truſt. She was intitled to the 20,000*l.* to pay debts, and diſtribute the ſurplus; two-thirds of which to her infant daughter, to whom ſhe was guardian. Then being truſtee of this very fund, ſhe does an act, which is inſiſted on to be a bar and extinguiſhment of this truſt of hers. On this foundation therefore, ſuppoſing the fine good in law, this court ought not to ſtand by and ſuffer a fine, levied by ſuch a perſon, to bar the equitable right, creditors had to this fund for payment of debts, and alſo the infant's; for ſuppoſe, the creditors wanted the reſidue of this ſum to pay them, this court would not ſuffer it to be ſaid, they ſhould not come againſt the eſtate becauſe of this fine levied by her: it would be abſurd; and if a practice of this kind was ſuffered to prevail, a Court of Equity might as well be aboliſhed by act of parliament.

Nonclaim on a void fine of no effect.

On fine by tenant for life, reverſioner need not enter until five years after his death.

Where a fine no bar in equity, tho' a bar in law.

Mortgagee is not barred by fine by mortgagor in poſſeſſion.

The ſecond point inſiſted on is the great length of time, ſince the right to this demand accrued to the plaintiff. This, I own, has the ſtrongeſt appearance; but yet not of ſufficient weight to bar this demand. It is true, that Courts of Equity do diſcourage ſuits for

Length of time how far a bar in equity to an

for old, ſtale, accounts, and very rightly; but every caſe of that kind muſt be conſidered on its own circumſtances, and ought to be determined by the juſtice and Equity of that particular caſe ariſing from thoſe circumſtances.. It is firſt to be obſerved, there is no ſtatute of limitation ſtands in the plaintiff's way; for that was not pleaded, or inſiſted upon at the bar. Next it is clear, that no preſumption of ſatisfaction ariſes from this length of time, that is to the plaintiffs; for it is not pretended, that any thing was paid to them, or that their right was in proper time fully diſcloſed to them. All that is ſaid, is, that the whole money has been applied to payment of debts of Lord *Jefferies*. If ſo, it is rightly applied; but that does not appear to me: but, ſo far as the evidence in this cauſe goes, I muſt take it to be otherwiſe: not that I mean to bind the defendants, but then to determine how far length of time ought to prevail in this caſe, the particular nature of the plaintiff's bill, and what appears in the former cauſe, ought to be conſidered. Firſt I do not take this bill to be a mere demand of a ſtale account of the perſonal eſtate of Lord *Jefferies*, but in part for the execution of a truſt of real eſtate. It is true, that when executed, it will become part of the perſonal eſtate of Lord *Jefferies*: but ſtill the fund and ſecurity, out of which it is to come, are real. Next it appears, that this partakes very ſtrongly of a bill to have the benefit of a former decree in this court, and for performance thereof. The direction there for the general account of Lord *Jefferies'* perſonal eſtate is placed a little oddly, but rightly; becauſe the principal fund for all the purpoſes was the 20,000*l.* but neither that account nor the creditors proving their debts was to retard the ſale for raiſing the 20,000*l.* which as ſoon as raiſed was to be brought before the Maſter for the purpoſes mentioned. I conjecture (for it is no more) that ſome objection was made at the hearing that cauſe, that the infant was not made party, and that the court over-ruled that objection; and rightly; becauſe the creditors were not bound to bring the infant, who was intitled only to a diſtributive ſhare of her father's perſonal eſtate, before the court: but ſtill Lord *Harcourt* ſaw a ſpecialty in it, that a truſt was to be executed, on which a large ſurplus was to ariſe, and would not order the cauſe to ſtand over for want of parties, but went on to give all thoſe directions, which would have been given, if the infant had been party: for it was but formality. Then he does not make a decree as if proceeding barely on a bill for ſatisfaction of creditors, (for then he would only have directed an account of the debts, the perſonal eſtate to be applied, and the ſurplus paid to the adminiſtratrix; which would be all that was neceſſary) but, finding the caſe in thoſe circumſtances, very rightly directed the raiſing the whole ſum, not only for payment of the debts; and decreed the truſtees to execute the truſt with juſt ſuch directions, as the court ſhould have

account; not againſt an adminiſtratrix calling for execution of a truſt of real eſtate: though ſtale accounts are diſcouraged.

have given, if the infant had been party; much the ſame as giving liberty to a perſon to come before a Maſter to claim an intereſt, which is frequently done in this court to accommodate families, and prevent variety of ſuits; juſt as legatees are directed to claim legacies. The way taken was to direct Sir *John Trevor* to be attended to check the account for benefit of the infant; which was all that could be done, if the infant had been a party. But ſuppoſe error in the decree, and that the court went farther than they ſhould (though I think rightly) Lord *Windſor* and his wife have not complained of it: nor is there any appeal or bill of review, nor could there be after this length of time. But I do not take it to be an erroneous decree; for there are ſeveral things this court may do *ex officio* for infants. The court often gives extrajudicial directions for an infant, and hears a perſon as *amicus curiæ*. I remember in Lord *Macclesfield*'s time in the caſe of the late Lord *Dudley*, on the miſmanagement of his eſtate, a ſtranger came and complained of the guardian and abuſe of the infant's eſtate; upon this application, and his undertaking to pay the coſts, the court directed the Maſter to examine the receiver's accounts, to ſee whether the infant was wronged or not. Beſide, this being a bill for execution of the truſt and to have the benefit of that former decree, Lady *Pomfret* is not barely ſuing for her diſtributive ſhare, (which is another conſideration), for ſhe ſues as adminiſtratrix *de bonis non* of her father, ſtanding in that right alſo. If then this truſt for raiſing 20,000*l.* has not been executed, what bar is there from length of time againſt an adminiſtratrix calling for an execution of this truſt of the real eſtate, which belongs to the adminiſtratrix and repreſentative of the perſonal eſtate to do? But beſide, there are ſeveral other circumſtances in this caſe ſufficient to ſurmount this objection from length of time in a court of equity. Firſt, the behaviour of the late Lord *Windſor*. It was his duty after that marriage to take care of the infant of very tender years, to whom his wife was mother and ſole guardian; and in order to that ought to have delivered an inventory of the perſonal eſtate into the Eccleſiaſtical Court; if not, he ought to have kept an exact account of it and of the debts; which was not done. Beſide, the directions of the decree of this court, anxiouſly given for the benefit of the infant, were left totally unperformed and neglected, no account taken; the fund not raiſed, nor notice given to Sir *John Trevor*. He was preſſed to ſell this eſtate immediately for raiſing the 20,000*l.* according to the decree. To that ſale a production of the deeds and writings was neceſſary; to avoid which he ſtood out to a ſequeſtration, and took all methods to evade the obedience of the decree in that reſpect. That was plainly the point he ſo oppoſed until the death of Sir *John Trevor*; and then no other perſon remained to take care of the infant's intereſt except her

Infancy. This court may give extrajudicial directions for an infant; or on a ſtranger's application and undertaking to pay coſts.

her mother, who was in the hands of the father-in-law, on whom all that power devolved; and how his interest lay, is plain. Next it is neceſſary upon the head of his behaviour to obſerve, there was no diſcloſure to Lady *Pomfret* after coming of age and marriage; and probable evidence, ſhe did not know of this deed of truſt til it was found among the effects of Sir *John Trevor*: that is not certain, but probable. Next upon this head of behaviour, the meſſages, on which the defendant Lord *Windſor* was ſent by his father in 1735 to the plaintiffs, deſiring ſome account to be made up, particularly about the time he wanted to ſell to a purchaſer, who inſiſted upon Lady *Pomfret*'s joining; which ſhews, that as ſoon as it is neceſſary, a meſſage is ſent to her, but before that time induſtry uſed to conceal the deeds and writings. But under this head the behaviour of the preſent Lord *Windſor* is to be conſidered; which is very much to be commended; at leaſt until the ſuit came on; and very different from his father's; which is not to be commended. The defendant's letters to Lord *Pomfret* and his ſolicitor ſpeak a deſire to do juſtice in the caſe; to have it determined in an amicable way; admit, he had been told, a balance was due to Lady *Pomfret*, and that ſhe was intitled to an account. The reſult in point of law is ſo ſtrong, that if this had been a caſe within the ſtat. of limitation, and that was inſiſted upon againſt the account, it had been ſufficient to take the caſe out of the ſtat. of limitation; and that here is a direct admiſſion of a title to, and offer to come to an account not only before arbitrators, but in *Chancery* if the other party choſe it; and a great deal leſs has been ſuffered to do on the ſtat. of limitation. As to the objection that this meant to refer to arbitrators the determination of the bar from length of time, and whether within the ſtat. of limitation, that is a moſt forced conſtruction: that is never thought of to be referred to arbitrators, but commonly the juſtice of the caſe, and other expreſſions ſhew, it was for the account the reference was intended, and was the point under conſideration.

Offer to account will take a caſe out of ſtatute of limitation.

The next defence and bar ſet up, is the purchaſes for valuable conſideration; which are ſeveral. The firſt (becauſe it goes to the whole) is the defendant Lord *Windſor*'s purchaſe in 1740; which I will lay out of the caſe; becauſe, if the plaintiffs are right in the demand on the other point, there is no colour to let that prevail, though for valuable conſideration; as it is admitted by all his letters and other tranſactions, he had clear notice throughout of this demand, admitting that when he purchaſed, he took a collateral ſecurity to indemnify him. But what is material, is from the two mortgages, purchaſes *pro tanto*. Firſt as to that to *Hoare* I am of opinion, there is ſufficient evidence of notice to him from the admiſſion in the anſwer of his repre-

Notice.

Second mortgagee with notice of a former, but without notice of a truſt charge antecedent to both, of which firſt mortgagee had notice, muſt take ſubject to that demand.

repreſentatives. No weight is to be laid on the objection, that it does not appear, when the copy of the deed found in his cuſtody came there; for if a perſon admits a deed in his cuſtody, whether as repreſentative or otherwiſe, it is incumbent on him to ſhew when; for it is impoſſible for the other ſide to ſhew it. But there is no doubt of notice. Next as to the ſecond mortgage to *Clavering*, which was after and with notice of *Hoare*'s mortgage, it does not indeed appear, there was any notice of this demand; therefore I will take it to be a mortgage without notice of it. That will not vary the order and priority of the plaintiff's demand; becauſe notice is admitted of *Hoare*'s mortgage and incumbrance, which was prior to *Clavering*'s, poſterior to the plaintiff's charge on this eſtate by this truſt, on which the legal eſtate continues to this day to the heir of the ſurviving truſtee. Conſequently as *Clavering* muſt take this mortgage ſubject to *Hoare*'s, it muſt be taken ſubject to every thing that was ſubject to. The conſidering the right and order of redemption in this court will prove it. The plaintiffs having a prior incumbrance, might compel *Hoare* to redeem them; which if done, *Hoare* would have a right in both capacities to compel *Clavering* and thoſe claiming the benefit of that mortgage to redeem him, or be foreclоſed; which muſt be to redeem him as to both, not by piece-meal; not only as to the incumbrance taken in from the plaintiffs, but as to the other. A Court of Equity would ſay, they ſhould not take away the legal eſtate *Hoare* would then have got from the truſtees, but muſt redeem as to the whole. *Clavering* then could be in no better condition. But in this caſe I do not think, there is occaſion to reſort to all theſe reaſons on the point of notice; for all theſe parties in both mortgages are all incumbrancers in, and claim only an, equity, the legal eſtate certainly ſtanding out in the truſtee. Then the Rule in Equity is, *qui prior tempore potior jure*; and as all the defendants as well as the plaintiffs have but an equity, that general rule muſt prevail with this diſtinction (which yet will conclude in favour of the plaintiffs) that it holds only, where none of the parties have a better right to call for the legal eſtate than the others; for there are caſes, where it is held, that they, who have ſuch right, ſhall be preferred. In *Brace* v. *Ducheſs of Marlborough*, 2 *Wil.* 495. the general rule only is laid down without entering into any exception or particularity therefrom; but in another caſe in *Ver.* ſuch exception appears. Now in the preſent caſe, laying aſide the point of notice, which of theſe parties, all claiming for valuable conſideration, has the beſt right to call for the legal eſtate out of the heir of the ſurviving truſtee? plainly Lady *Pomfret*; for they are truſtees for her, that is for the repreſentative of the perſonal eſtate of Lord *Jefferies*, which ſhe is as adminiſtratrix *de bonis non* of her father, and in another

Where all claim in Equity, qui prior tempore, potior jure.

Save where one has better right to call for the legal eſtate.

light as truſtees for her diſtributive part. Then neither of the others have an equal right with her; but ſhe has better than any other to call for it.

None of theſe defences therefore can prevail in Equity againſt the plaintiff's demand.

Intereſt. From what time: when it became a duty decreed.

The laſt queſtion is as to the intereſt of this, whatever it ſhould come out to be. Lord *Jefferies* was in poſſeſſion of this eſtate until his death; after which, and after Lord *Windſor* on his marriage with the widow got the whole management, her real eſtate was the debtor, the perſonal eſtate of Lord *Jefferies* was the creditor, for this ſum. The fund, on which it was charged, produced profits, which might anſwer intereſt; and it was a charge of a portion on real eſtate; from the time therefore it ought to be raiſed and paid, it in its own nature ought to carry intereſt, though not mentioned. Though it is not neceſſary to cite caſes for this, Lord *Kilmurry* v. *Geary*, *Eq. Ab.* 341. was ſtronger than this, becauſe it aroſe merely under a power, and has been cited in this court, and allowed a right determination. As to the particularities of the preſent caſe, the decree has not only directed this to be raiſed, but anxiouſly directed the two-thirds to be placed out for the infant's benefit. This Lord *Windſor* diſobeyed, and in my opinion broke his truſt as guardian; and if the court ſhould ſtand ſtill, and let all the profits of this fund be put into his own pocket, it would be a ſtrange determination. The next conſideration is, from what time it ſhall carry intereſt? In my opinion the times inſiſted on for the plaintiffs, the death of Lord *Jefferies* and the decree in 1712, are too early to commence from. Though Lord *Windſor* was greatly to blame, and the default has much the greateſt part ariſen from him, yet I cannot quite excuſe the plaintiffs from ſome lacheſs. Thus far appears; that from 1735 there was ſome intimation of this demand; which is material to be taken into conſideration; but I do not ſo much go on that as on another circumſtance, which furniſhes me with a proper period of time in a caſe, attended with ſo great a length, to fix it. Lord *Windſor* and his wife in her right were guardians; and unleſs the contrary is ſhewn, it muſt be preſumed, that until her marriage they maintained her. She was properly to be maintained by them; and what was advanced toward that, does not appear. The inclination of my judgment is to take the commencement of the intereſt from the time of the plaintiff's marriage in 1720; which will be carrying it back a great way in a caſe of this kind, that ariſes after ſo great a length of time.

Portion on real eſtate carries intereſt in its nature, though not mentioned.

For Plaintiffs it was then urged, that the infant had been maintained out of her own eſtate; and further, that the debts paid by

by Lord *Windſor* ſhould go to ſink the intereſt of the 20,000*l.* before it ſunk the fund itſelf: otherwiſe Lord *Windſor* would have the profits of this ſum in his own pocket from the death of Lord *Jefferies* to 1712.

Lord Chancellor took a little further time, and *Aug.* 3. ſaid, this was on the beſt conſideration his opinion. There were antecedent truſts on the 20,000*l.* itſelf, before it was to come to the perſonal eſtate of Lord *Jefferies*; conſequently it is impoſſible to ſay at his death, how much was due to his eſtate; for nothing but a reſidue was to be paid to his executors and adminiſtrators. Then conſider what alterations were made by, and what was the intent of, the private act of parliament. The liquidation is thereby made. It is an act for ſale of the eſtate of *Lord Chancellor Jefferies* for payment of debts and portions. This truſt is taken up collaterally: the plain reſult of the enacting clauſe, which is very remarkable, (and on that I ground my opinion) is, that the legiſlature diſcharged the 20,000*l.* from all the other truſts and incumbrances on it before; but directed Lady *Windſor* to be reimburſed what ſhe deducted out of her jointure; ſo that they meant to reduce the clear reſidue to a certainty, from whence then muſt the intereſt on that reſidue commence? (for it cannot upon the ſums paid by Lady *Windſor*, which were at home) whether from the paſſing this act, or from the decree? In this caſe it is a reaſonable meaſure to direct the intereſt upon the reſidue from the decree; for inſtantly from paſſing the act would be too ſtrict: ſome time muſt be given for the ſale. But from the decree (on the foot of which I am willing to take things, and not to do any thing to interfere therewith as it was ſo carefully made for the infant) *tranſit in rem judicatam*; and then this reſidue is not only a ſum charged on land, but a duty decreed; and therefore it is right it ſhould carry intereſt at four *per cent.* from that time.

Caſe 164. Harriſon *verſus* Rumſey, *July* 30, 1752.

ON petition.

Decree by conſent, not ſet aſide.

Lord Chancellor ſaid, he would by no means ſet aſide a decree obtained by conſent of counſel on both ſides; for it would be moſt dangerous. It was an eſtabliſhed rule not to do it; nor would he make the precedent. There was a good while ago an appeal of that kind in the Houſe of Lords, who deſired the party to bring an action againſt the counſel. If they could prove colluſion on the counſel, it would be a different thing.

Ex

Ex parte Skip. *July* 31, 1752. Caſe 165.

LORD CHANCLELOR.

THE rule of the court is, upon a bill to be relieved againſt demands of uſurious intereſt, not to make void the whole debt, but it muſt be on ſubmiſſion to pay what really is due: but it is different in a commiſſion of bankruptcy. For then the queſtion is, whether the aſſignees have not a right to inſiſt, that the whole is void as an uſurious contract? They have ſuch a right; and unleſs the aſſignees and creditors ſubmit to pay what is really due, I cannot do it. This has been attempted often, to turn this proceeding in a Court of Equity in commiſſions of bankruptcy into the nature of a bill to ſet aſide an uſurious contract; but refuſed.

Bankrupts. Aſſignees not compelled to pay what is really due on uſurious contract.

Anonymous, *July*, 1752. Caſe 166.

ON motion for *ne exeat regno*.

LORD CHANCELLOR.

An affidavit to found ſuch a writ upon muſt not only ſay, that the defendant is indebted ſuch a ſum, but muſt alſo mention the facts, on which it ariſes, and on which it is grounded. And in this caſe the bill being againſt an adminiſtrator, the affidavit ought to ſwear (or to the beſt of his knowledge or belief) that aſſets had come to his hands; becauſe the demand ariſes in *auter droit*: otherwiſe it would be holding one, who would not be held to bail at law; and would detain a perſon here, whom they had no right to detain, the demand ariſing in *auter droit*.

Ne exeat regno.

Ex Parte Artis, *Aug.* 1, 1752. Caſe 167.

PETITION on the part of bankrupt's wife claiming an annuity out of his eſtate; for the payment of the arrears of which annuity to her there was a decree, and that 1700*l.* part of the eſtate, aſſets being admitted, ſhould be placed out to ſecure the growing payments to her.

Bankrupts.

LORD CHANCELLOR.

A value ſet on a general perſonal annuity on bankrupt's eſtate.
But where annuitant is a creditor by decree alſo, deficiency made good out of the capital.

The general rule as to common annuities in general is, (as I take it) and is certainly right, that where one is intitled to an annuity from another, which is not a rent charge on land or on a ſpecifick part of his eſtate, but a perſonal annuity to be paid by that perſon who becomes bankrupt, it is only a general demand on him and his eſtate, and there is nothing then a debt on his eſtate but the arrears of the annuity at the time of the bankruptcy; for thoſe accruing afterward become a debt after the bankruptcy. The method then taken to do juſtice on both ſides is this; was the annuitant to be admitted only as a creditor for the arrears before the bankruptcy, it would be a great prejudice to the annuitant, who would loſe a right: was it to be put in another ſhape, ſo that the annuity was to be received from time to time as an accruing debt on the eſtate, that would make the diviſion of the eſtate perpetual, and there could be no final diviſion during the annuitant's life. To avoid therefore the injuſtice on one hand, and to attain a dividend of the eſtate at a certain time, the court puts it in another ſhape of ſetting a value on the annuity; becauſe it was only a general, perſonal, demand. That is the rule in general caſes: but this is a very particular caſe. The petitioner not being a creditor only for an annuity in general out of teſtator's eſtate by reaſon of a *devaſtavit*, the executor, (in whoſe hands it is), may have made; (it having been argued that this caſe was only in nature of a *devaſtavit*, which is only a perſonal demand) but ſhe is alſo a creditor by decree, and was intitled to have that ſum placed out at the time of the decree. Then the commiſſion of bankruptcy has made no alteration in that right except only as to the levelling, which is the effect of the bankruptcy; but ſhe has a right to have the ſum placed out, and then the right between her and the aſſignee is, if that does not anſwer her annuity, that ſhe has a right to apply, as ſhe would have againſt the bankrupt, to have it ſupplied out of the reſt. That has often happened out of a deficient fund. It appears to be like the caſe of a covenant or agreement in conſideration of marriage or other conſideration to lay out money in purchaſe of land; if the bankrupt had ſo covenanted before his bankruptcy either for a jointure for his wife for life without more, or for a jointure and alſo remainder over; the right would be, not to ſet a value upon this, but to ſee what would be the proportional dividend to come out of the eſtate as to the money to be laid out in land, and that ſhould be laid out in land: which if ſettled in ſtrict ſettlement, then the wife could have no more than the intereſt and dividend during her life; becauſe ſhe could not draw out any part of the remainders; and they would be all loſers equally. But if it was only to be ſettled on her

her for life, ſo that the reverſion would be in the bankrupt himſelf, if the dividend would not produce that, ſhe ſhould then come upon the fund to make good that deficiency; for ſhe would be intitled to that benefit againſt the bankrupt: but not againſt the remainders who would be equally intitled with her. This differs from a bond with penalty, which is a perſonal contract. This is the right, and in that manner muſt it be diſpoſed of. Let her out of the dividends be paid the growing payments of her annuity. If that ſhould prove deficient, let it be made good out of the capital to be raiſed by ſale of ſufficient part from time to time.

Finch *verſus* Finch, *October* 24, 1752.

Caſe 168.

Defendant without excepting to firſt report of inſufficiency not abſolutely precluded from inſiſting on the ſame matter in ſecond anſwer.

THE bill was for the execution of the truſt of an act of parliament and will made by *Daniel* Lord *Nottingham*; the truſt of which was to pay debts and portions charged on the eſtate, next to ſettle the eſtate in the ſeveral branches of the family. None of the ſons, who were to be tenants for life, had iſſue male but *Edward* the youngeſt; who with his eldeſt ſon *George*, brought the bill for performance of the ſaid truſts; praying alſo that the defendant *Henry*, one of the elder brothers of *Edward*, might diſcover, whether he was married, or had any iſſue male, or gave out that he had ſuch, who would be intitled before the plaintiff *George*. *Henry* inſiſted by his anſwer, that he was not obliged to make ſuch diſcovery. The Maſter reported the anſwer inſufficient, and alſo a further anſwer inſiſting upon the ſame, and that the making ſuch diſcovery would ſubject to Eccleſiaſtical penalties.

LORD CHANCELLOR.

There are two queſtions: the firſt on the forms and rules of the court and method of proceedings. The other on the merits of the caſe as made by the bill.

Firſt, whether the defendant by ſubmitting to anſwer without excepting to the firſt report of inſufficiency has precluded himſelf from inſiſting on the ſame matter now by his ſecond anſwer? Though to be ſure in the preſent caſe it is ſomewhat odd to bring it before the court in this ſhape, yet I cannot ſay, he is abſolutely precluded by the forms of the court from doing it. I have known this often in queſtion and determined; that where an anſwer by the Maſter on the firſt exception is reported inſufficient, the defendant ſubmitted to anſwer, upon exception to that ſecond anſwer the like report is made, the defendant has excepted to that

ſecond report, and brought it before the court: where there are ſeveral exceptions, the court has always ſaid, that, as this matter has not undergone the judgment of the court, they ſhall be ſuffered to go into it: if it was a ſingle exception, perhaps it would be another matter. It is not like a ſecond demurrer or dilatory, or a ſecond plea, which cannot be put in a ſecond time, if over-ruled: yet notwithſtanding the court frequently allows the defendant an after plea, it has over-ruled to inſiſt on the ſame matter by anſwer, which was over-ruled as a plea: and that comes on the merits at hearing the cauſe. The court has gone on the ſame way upon exceptions by letting in to ſhew, whether the Maſter was miſtaken or not.

No ſecond dilatory allowed.

But anſwerer may inſiſt on what was over-ruled as a plea.

Next as to the merits, whether this matter is relevant and material to anſwer; and ſuppoſing it ſo, whether there is a defence as to the anſwering it as to penalties; becauſe, though material, yet if the defendant has an excuſe againſt anſwering it as being matter of ſcandal, or ſubjecting him to penalties, he may plead this, and inſiſt, that the plaintiff muſt be put to prove it, as he can? Two general grounds are inſiſted upon for the plaintiff to ſhew this is material. Firſt that every plaintiff is intitled to have a diſcovery from defendants as to two heads; to enable him to obtain a decree, and to aſcertain facts material to the merits of his caſe, either becauſe he cannot prove, or in aid of proof; for a man may be intitled to an anſwer of what he can prove, to avoid expence. Next that he is intitled to a diſcovery of matters to ſubſtantiate his proceedings, and make them regular and effectual in this court. Then the queſtion is, whether the point inſiſted upon to be anſwered is ſo material or not? As to the firſt of theſe, whether it is material as to the decree to be made on the merits, and the ſettlement to be directed by the court thereby, that is not the ſtrong point for the plaintiff to found his preſent prayer upon; for the anſwer rightly inſiſts, that whether he has a ſon or not, there is no occaſion to name that ſon in the ſettlement; and it would be improper in many caſes to do ſo. It is ſufficient and proper to make the ſettlement with limitations to the ſeveral ſons as tenants for life, remainder to truſtees to ſupport contingent remainders, remainders to the firſt and every other ſon without naming them. Though the ſons may have been named in framing a ſettlement, where all the family agreed, yet in moſt caſes it is moſt proper not to name them; for it may happen, that ſome remainder-man may diſpute, whether he was a legitimate ſon or not. In that reſpect therefore I do not think it ſo material to have an anſwer to this. But on the other point it is material and neceſſary; for whom is it neceſſary for the plaintiff to bring before the court for performance of theſe truſts? It is admitted to be neceſſary to bring the firſt perſon intitled to the remainder

Plaintiff intitled to diſcovery of facts material to the merits, for want or in aid of proof, or to ſubſtantiate his proceedings.

In ſettlements it is not proper to name the firſt and every other ſon.

On bill to execute truſt the firſt intitled to inheritance is a neceſſary party, if in being.

remainder and inheritance of the eſtate, if ſuch is in being. It is true, if there is none ſuch, in whom the remainder of the inheritance is veſted, in being (as if none of the ſons of this family had iſſue male at all) then it is impoſſible to ſay, the creditors are to remain unpaid and the truſt not to be executed, until a ſon is born. If there is no firſt ſon in being, the court muſt take the facts, as they ſtand. It would be a very good decree; and no ſon born afterward could diſpute it; unleſs he could ſhew fraud, colluſion, or miſbehaviour in the performance of theſe truſts: otherwiſe he would be bound by it. But if there is a ſon born, which is a remainder in tail exiſting, it is a different caſe; for then if tenant for life brings a bill for performance of it without him, he would be intitled without ſhewing fraud or colluſion to overhaul all this matter. I have known that done: in ſuch caſe, if the court has ſeen every thing to be fair, the court has only given liberty to ſurcharge and falſify; or may open the whole, as the circumſtances appear. But the fact is, that *Edward* has a ſon, who has a remainder in tail near or remote veſted in him, who is plaintiff. If he is not the firſt remainder, the having him before the court is quite immaterial. If *Henry* has a ſon in being, it would be immaterial to make *George* a party; for the court only requires to bring the firſt remainder in tail in being before the court, without whom the having a ſecond or third remainder party is not ſufficient. In this reſpect then it is material to have the ſon of *Henry* before the court; as the truſtees cannot, if there are ſuch in being, act concluſively without it; ſince he may afterward controvert all this decree, becauſe he was in being at the time of the decree, and may raiſe queſtions on the ſettlement. But the queſtion is, whether he is intitled to have this diſcovery from the defendant, or to be left to prove it. As to the firſt objection to it, that it will ſubject him to eccleſiaſtical cenſures, and that the court will not compel him to anſwer on oath, which is like an oath *ex officio*, that is true: but there is nothing upon this that will do it: for it would be carrying this to a great degree to ſay, that by poſſibility it may tend to this, when no queſtion is aſked, that may tend thereto: for every thing neceſſary muſt be proved in order to ſubject to that penalty. It does not tend to diſcover, whether he cohabited with any woman, if he ſhould anſwer, whether he has or has not a ſon lawfully begotten. That would be going a vaſt way, and tend to cover facts, which ought to be diſcovered in this court. But next according to the general rule it is true, you cannot aſk a diſcovery of him, as you may examine him as a witneſs; and it is true, that that diſcovery would not be concluſive: but that is no anſwer to what is inſiſted on for the plaintiff, for that may often happen: a man is intitled to a diſcovery, and no one is bound thereby but the perſon, who made it, and his

Defendant not compelled to anſwer ſo as to ſubject to Eccleſiaſtical penalties.

But muſt anſwer, whether he has a legitimate ſon; but not whether he is married or no, or whether he is an alien.

ſon after coming of age might bring a bill to controvert it. But why is it ſaid, *Henry* is only to be examined as a witneſs? He is a proper and neceſſary party to the bill for execution of the truſts, and making the ſettlement; conſequently he is intitled to know, whether he had any child or not. Such queſtions are frequently aſked here of the parties brought before the court, how many children they have, in order to ſettle the proportions among the children; and there is no other way but by aſking the parents; for you cannot have a diſcovery from an infant, nor can you except to an anſwer of an infant; which is a general rule. It was the ſame in the caſe of Mrs. *Dupleſſis*. There it was prayed, ſhe ſhould diſcover, whether ſhe was an alien, and next whether her child was an alien, and where born? I held, ſhe was not bound to diſcover, whether ſhe was an alien: but that ſhe was, whether her child was an alien, and where born, and obliged her to ſet it forth. So here *Henry* is the proper perſon to anſwer that. I am of opinion therefore, it is neceſſary for the plaintiff to have this diſcovery to ſubſtantiate his decree, which would be imperfect without it: nor can he have a binding decree on all parties without having this perſon before the court, if there is ſuch a one. He is intitled therefore to have it on both heads, as to ſubſtantiating the proceedings, and as to the merits of the caſe. But then the queſtion is, how far he ſhould anſwer. I do not know, that it is material to anſwer all the exceptions; and doubt, whether you are intitled to have from the defendant any more than a diſcovery, whether he has iſſue male born and as to his declarations concerning that: but I doubt, whether you can compel him to diſcover, whether he is married or not. Suppoſe, he publickly lived with and avowed a woman as his wife, and had no ſon by her, and you brought a bill to diſcover, whether he was married to her or not.

It was then urged for the plaintiff, that if this was diſcovered, they might be able hereafter to anſwer the evidence ariſing from cohabitation and publick declarations of marriage.

LORD CHANCELLOR.

I am not to compel a diſcovery to create evidence for ſome future cauſe. The ground, I go upon to allow the exception to the anſwer, is not as to the ſettlement, but that it is neceſſary to have proper parties to ſubſtantiate the proceedings. Therefore allow the exceptions ſo far, not as to the reſt, which would be carrying it too far.

Lord

Lord North and Guildford *verſus* Purdon, *July* 1752. Caſe 169.

At the *Rolls*, Sir *John Strange*, *M. R.*

THEOPHILA MOOR deviſed all her worldly ſubſtance, after payment of debts and funeral expences, to *Mary Lovemore*, deſcribing her as a poor girl whom ſhe had brought up and educated, to be paid her at twenty-one or marriage, which ſhould firſt happen, provided ſhe marries with conſent of ; or in caſe ſhe dies before attaining the age of twenty-one or marriage as aforeſaid, then all her worldly ſubſtance to : then makes the defendants executors, heartily requeſting them to be ſo kind as to take on them the execution of the will.

Mary Lovemore dying under age and unmarried, there were now three claimants.

The plaintiffs next of kin to teſtatrix; who inſiſted on a reſulting truſt, and the late caſe of *The Biſhop of Cloyne* v. *Young*, *December* 7, 1750.

The father of *Mary Lovemore*, as her perſonal repreſentative; who inſiſted on its being veſted in her, and within the old rule where only the time of payment is poſtponed, and the time of payment certain. As a condition, it is ſubſequent, eſpecially as it regards marriage; and being impoſſible to be performed, is, according to Lord *Coke*, as none at all; nobody being named to whom given over. Then it muſt remain veſted, taking it as a contingency, that muſt happen to deveſt it.

The executors inſiſted, it devolved on them; it is plainly not intended to go in all events to *Mary Lovemore*, being determinable on a particular event; conſequently cannot go to her repreſentative. Tho' teſtatrix is ſilent as to the object, to whom given over, there is an object, and that in the will, by force of making them executors: nor is there any ground on the penning to take away their ſtrong legal right, or to ſay they are executors in truſt. A court of equity interpoſes on account of caſes, which have by antiquity acquired ſtronger reaſons, than they were at firſt introduced with; and it had been happy, if the known principle of law, which obtained until *Foſter* v. *Munt*, had been adhered to. But the preſent caſe is not within any of the former, here being no legacy, nor any neceſſary implication to defeat the executors. The latter words of earneſt

requeſt by teſtatrix are ſo much words of form, and taken from the antient notion of the burthen of adminiſtration, and ſo commonly inſerted, that no inſtance where ſuch requeſt has made executors take as truſtees; and not for their own benefit. Though they meant to give ſome ſort of truſt, it was bounded and tied up to the care of the orphan. *The Biſhop of Cloyne* v. *Young* was not ſo favourable for the executors as this: and it went farther than any other; and there are ſeveral circumſtances to diſtinguiſh it.

Maſter of the Rolls, having taken time to conſider, *November* 13, 1752. decreed in favour of the plaintiffs. The adminiſtrator of *Mary* is not intitled, as his right depends on this legacy's being veſted in her, which was not ſo; for if ſhe died before twenty-one or marriage, it was to go over, though at making the will teſtatrix was not reſolved to whom; but plainly never intended, *Mary* ſhould take, unleſs one of the contingencies happened. Next as to the executors: there are ſeveral caſes where they are conſidered but as truſtees for next of kin. Firſt where a legacy is given for care and trouble: afterward, although thoſe words are omitted, from the preſumption by giving part. This court has gone further: and if a neceſſary implication or violent preſumption appears, that they were not to take any thing to their own uſe, though no legacy was given to them, yet will they be only truſtees: as was ſolemnly determined by *Lord Chancellor* in *The Biſhop of Cloyne* v. *Young*, where, as the reſiduary clauſe was begun, there was the ſtrongeſt preſumption, that the reſidue was not intended for the executors. So here there is an inchoate clauſe, that on the event's not happening, whereby *Mary* ſhould take, it ſhould go over; though to whom teſtatrix had not then ſettled. But when ſhe mentions her executors by name, and only as ſuch, in the following ſentence, ſhe plainly intended them no farther favour: and there are added pathetick, ſupplicatory words addreſſed to her executors to take on them the execution and burthen of her will; which words ſhe could not be ſuppoſed to have uſed, had ſhe intended them ſo great a benefit, as the reſidue of her eſtate if *Mary* died before twenty-one or marriage. The plaintiffs claim not from any intention to them, but as undiſpoſed, and though part be given to the next of kin, yet ſhall not that hinder them from taking the reſt, if the intent appears, that the executors were not to take the ſurplus.

Caſe 170. ——————, *July* 10, 1754.

Depoſitions *de bene eſſe*, where witneſſes are dead, and no opportunity to examine in chief, though after great length of time, publiſhed: but without prejudice to exception at the hearing.

MOTION on the part of the plaintiff Duke *Hamilton* that the depoſition of witneſſes, examined *de bene eſſe* in a cauſe in 1710, ſhould be now publiſhed along with the depoſitions taken

in

in the ſupplemental cauſe upon affidavit of the death of ſeveral of thoſe witneſſes, and that upon inquiry nothing could be learned, of what had become of the reſt of them.

It was ſaid, that upon application to the *regiſters* no inſtance could be found, where the court refuſed to let ſuch depoſitions be publiſhed on proof made to the ſatisfaction of the court of the death of ſuch witneſſes. There was no lacheſs; for that by a judgment in the houſe of Lords in 1713. the plaintiff in that cauſe was held to be not intitled *in præſenti*; and the remainder in fee in the old family-ſettlement having now fallen in upon the failure of all the antecedent limitations in tail, therefore was the preſent application.

It was oppoſed upon this, that theſe orders for examining *de bene eſſe* being only proviſional, if there is an opportunity to examine in chief, it muſt be done; and if any lacheſs in ſo doing, theſe proviſional orders are forfeited: otherwiſe all theſe examinations would be in effect examinations in chief: and that there had been ſuch lacheſs here.

LORD CHANCELLOR.

The general rules of the court as to publiſhing depoſitions taken *de bene eſſe* are well known and eſtabliſhed in common caſes: but ſometimes there are caſes, in which particular queſtions ariſe on particular circumſtances, and in which it is in the diſcretion of the court to determine. In the common caſe of theſe depoſitions *de bene eſſe* if they die before iſſue joined, and there is no opportunity to examine in chief, it is a motion of courſe on a proper affidavit to publiſh them. But this is upon ſpecial circumſtances. The neceſſary foundations are, that theſe witneſſes are dead or beyond ſea at the time of applying, or before ſuch time as there was an opportunity to examine in chief; which are both ſhewn on the part of the plaintiff. Firſt I am ſatisfied of the death of theſe perſons from the length of time. They muſt have been of a conſiderable age at the time they were examined; becauſe the examination was as to things in the time of K. *Charles* the ſecond; where therefore there is ſuch a length of time, the leſs poſitive proof will do. As to the next, ſufficient is laid before the court on the part of the plaintiff; becauſe iſſue has never been joined in the cauſe. The defendant never thought fit to apply to diſmiſs the bill: but both parties acquieſced. But the objection by the defendants is, that there has been a lacheſs on the part of the plaintiff. There was no ground for the plaintiff in that cauſe to proceed after the judgment of the *Houſe of Lords*. As to any the material parts of it nothing remained to do but to perpetuate the teſtimony of the witneſſes;

Iſſue was never joined; and defendant acquieſced as well as plaintiff in not applying to diſmiſs.

Bill to perpetuate, if ſet down, diſmiſſed: but the teſtimony not thereby prejudiced.

neſſes; and if the bill for that purpoſe had been ſet down to be heard, it muſt have been diſmiſſed, as ſuch bills always are: tho' that diſmiſſion does not prejudice the teſtimony of the witneſſes. But the queſtion is, whether the plaintiff's not examining theſe witneſſes in chief is under the circumſtances ſuch a lacheſs, as that theſe depoſitions ſhall never be publiſhed? As to that, this is a lacheſs not only of the plaintiff but defendant; for a defendant to a bill to perpetuate teſtimony of witneſſes may apply to diſmiſs the bill for want of proſecution as well as in the caſe of any other bill. Inſtead of that the defendant has reſted under it; ſo that there is an acquieſcence on both ſides. But in all theſe caſes of publiſhing theſe ſort of depoſitions in ſpecial caſes the court muſt determine themſelves by circumſtances. If therefore any ſurpriſe appeared in this examination, the court would have laid weight on that to prevent the publiſhing them after this length of time: but no unfairneſs or ſurpriſe appears, but the contrary. Under theſe circumſtances therefore, and conſidering the defendant's acquieſcence alſo in not taking advantage to diſmiſs the bill, I am of opinion, I ought to publiſh theſe depoſitions: but with this cautionary clauſe that this is to be without prejudice to any exception, that may be made at the hearing by any of the defendants againſt reading theſe depoſitions againſt ſuch of the defendants.

Caſe 171. Earl Brook *verſus* Bulkeley, *July* 13, 1754.

Et e con:

Purchaſer from tenant in tail with notice of agreement by him to renew a leaſe, which the father tenant for life had covenanted to renew, is bound to renew.

THE general queſtion was, whether the defendant *Hulſe* was under the circumſtances of the caſe bound to renew a leaſe claimed by the other defendant *Bulkeley*? This depended on the ſtate, in which things ſtood at the time of the purchaſe of the eſtate by *Hulſe* from the plaintiff; and next upon the circumſtances as to the agreement between the plaintiff and *Hulſe*; and whether *Hulſe* had any allowance for this renewal in the agreement, and has or has not ſubmitted thereto as between them?

LORD CHANCELLOR.

The firſt queſtion will depend on the obligation, the plaintiff was under at the time of the agreement for the purchaſe to renew; and next on the notice of that obligation; for if the plaintiff was under an obligation either in law or equity to renew, and *Hulſe* or his agent at time of the purchaſe had notice of ſuch obligation; the eſtate muſt be taken ſubject thereto, and bound by that obligation. It is ſaid, the notice is not ſufficient; for that the plaintiff's father, who covenanted to renew, was only tenant for life with a

common power of leaſing, which could not extend to ſuch a covenant to renew; nor could he bind his ſon the plaintiff, who was tenant in tail; and that the plaintiff afterward covenanted only out of honour to his father's memory; ſo that it is an agreement without conſideration. But there can be no weight in that; for though it is true, the plaintiff is not bound by the covenant of his father, as his father exceeded his power, yet as the plaintiff was intitled to his father's eſtate, whatever aſſets his father left either real or perſonal would be liable to that covenant. A bill might be brought for a ſatisfaction out of aſſets or an action for damages on the foot of that covenant; and therefore the plaintiff partly in point of honour to ſatisfy the covenant of his father, and partly to deliver himſelf from ſuch a litigation and trouble, covenanted. If ſo then I am of opinion, that is a ſufficient conſideration to bind him; and conſequently it would go over, and bind the perſon, who took the eſtate with notice of that obligation, he had laid himſelf under. Then on what terms is *Hulſe* bound to renew? The plaintiff's aim at the time of ſelling his eſtate was to deliver himſelf from that obligation, he was under, and for which he was liable to a ſuit in equity, and to lay that obligation on the purchaſer; and then he certainly would not do it by halves. The plaintiff's bill is to indemnify and deliver himſelf from an action or ſuit in equity, that might be brought againſt him by *Bulkeley*; and *Bulkeley*'s bill is to have a leaſe made to him, or to have a ſatisfaction from the plaintiff. I muſt decree a performance of this agreement, and that a leaſe be made by *Hulſe* agreeable to the prayer; which plainly appears to be the intent of the parties. The allowance appears to be made to *Hulſe* at the time of the purchaſe in that reſpect, and not on account of an over valuation as was endeavoured to be made out. The confeſſion of *Hulſe*'s agent plainly ſhews it. It has indeed been ſaid, that confeſſion is the weakeſt evidence; and the uſual objections have been made thereto, that it may be made an improper uſe of, *&c.* and though it is liable to thoſe objections, yet thoſe objections never hold ſo far as to overturn and deſtroy that confeſſion, where it is clearly proved, as in the preſent caſe. *Hulſe* therefore or his agent having at time of the purchaſe, notice of the agreement between the plaintiff and *Bulkeley* is bound in equity to renew the leaſe.

Earl of Tyrconnel *verſus* Duke of Ancaſter, Caſe 172.
Duke of Ancaſter *verſus* Lady Sherrard.

July 15, 1754. *L.C. Mmtl. 237.*

SIR *Brownlow Sherrard* was by his father's will made tenant for life without impeachment of waſte, with a power to make a jointure in theſe words; "that it may be lawful for my "ſaid ſon at any time or times by any deed or writing atteſted "by

Power to huſband to make jointure not exceeding clear yearly value of 100l. for every

1000l. portion: part of the portion is limited, the intereſt to the huſband for life, then to increaſe younger childrens fortune; if none, to ſurvivor of huſband or wife: this conſidered as received by him as ſettled fairly for the family, and for his benefit, and within intent of the power.

" by witneſſes to aſſign, limit, or appoint, to the uſe of, or in " truſt for, any wife as well before as after marriage for her life, or " any number of years determinable upon her death, all or any " part of the ſaid manors and premiſes, not exceeding in the " clear yearly value, 100*l.* *per annum* for every 1000*l.* which my " ſaid ſon ſhall receive for and as her portion upon marriage, and " ſo in proportion for a greater or leſs ſum;" and with a further power to ſettle a certain ſum of money on younger children.

After the death of his father, Sir *Brownlow Sherrard* in 17 8, intermarried with *Mary Sidney*, who had a portion of 10,000*l.* and in conſideration thereof he thereupon made a ſettlement of an eſtate in *Lincolnſhire*, called *Lobthorp*, by way of jointure on his wife, which eſtate was taken to be of the value of 800*l.* *per ann.* and by the ſame deed he covenanted to ſettle 200*l.* *per ann.* to make up the jointure of 1,000*l.* and as to 2,000*l.* part of the 10,000*l.* it was to be continued at intereſt to increaſe the portion of the younger children in ſuch manner, as the huſband and wife ſhould appoint; and in default of appointment to be divided among them if there ſhould be any ſuch younger children; and the intereſt thereof in the mean time to be paid to Sir *Brownlow Sherrard* for life, and then to the younger children; and if none, then to the ſurvivor of the huſband or wife.

Clear muſt be as at the time of making the jointure, and not during its continuance; which would make theſe powers fluctuating.

He afterward, by a deed in 1745, made an additional ſettlement of another eſtate on his wife to make her jointure equal to 1,000*l.* *per ann.* rent charge; and therein declared, his intention was to execute his power as far as poſſibly he could, not having fully executed it before.

Sir *Brownlow Sherrard* died in her life without iſſue of the marriage.

Clear means free from charges uſually allowed between buyer and ſeller, and by courſe of the country borne by tenant, but ſubject to land-tax and thoſe borne by landlord. *See Doug. R. 3. vol. 624.*

Two general queſtions were now made. Firſt what portion he was to be conſidered to have received with his wife, and conſequently how many 100*l.* *per ann.* ſhe was intitled to have in proportion to that fortune according to the power? Next what that jointure, or that number of 100*l.* *per ann.* to which ſhe was intitled according to the power, ought to be clear and diſcharged from within the terms of the power and the execution of it by Sir *Brownlow Sherrard?* which laſt took in two conſiderations: firſt at what time the value of the jointure in reſpect of certain charges was to be conſidered? ſecondly what thoſe charges are from which it is to be diſcharged?

LORD

LORD CHANCELLOR.

The first question is upon the fact, whether Sir *Brownlow Sherrard* is to be considered as having received 8,000*l.* or 10,000*l.*? I am clear of opinion, that he must according to the nature of the thing be considered as having received a portion of 10,000*l.* with his wife. It is not now to be disputed, but that on the marriage it was to be considered as 10,000*l.* but then the objection arising on the part of the defendant is, that 2,000*l.* though part of her portion, was not received by Sir *Brownlow Sherrard*, and that in consequence of the settlement by his not surviving, it came back to her, as there were no younger children; and is to be considered as no part of the portion, on which the jointure was made, and therefore not being received no jointure is to be made for it. But I am of opinion, that objection does not hold. I agree, that where a jointure is to be made under such limited powers of a portion to be received, the transaction must be fair, *bona fide*, without fraud and collusion; and therefore if it is a nominal, not a real, portion, that will not do. It often happens, that a man marries a lady with a small portion, and he or his friends advance money to make up that a nominal portion, and take it back: that will not do. So if the wife had a portion of 10,000*l.* and that is settled to her separate use; that will not do. But that is not the present case. Parents create these powers with this view, to compel their children to marry prudently with a wife of an adequate quality, certainly of an adequate fortune, and not burthen the estate with a great jointure for a wife, who brings nothing into the family, and who probably will not deserve it. Wherever therefore the portion of the wife is stipulated to be applied in a proper and reasonable manner in the usual way of settling for benefit of the family, that is to be considered as a portion received. Not that the father meant, that every part of this portion shall be actually received by his son to spend or waste; that could not be the meaning. If therefore it is settled so as to come for benefit of the family in the fair way of contracting and making settlements, that comes for benefit of the husband and his family: and that is the present case. These parties were young at the time of marriage, and might have several children. It was reasonable to take so much of her fortune as an increase of the younger children's portion, which the husband had under his father's will a power to settle: and it was for the husband for life (so far for his benefit) then to the younger children, if any, if none, the survivor to take a chance. Why might he not give her the chance of survivorship as well as to any other? This then is an application of the portion by the husband in a reasonable and fair way according to the settling in families in a

proper manner, and therefore to be conſidered as within the intent of the power. If the intereſt of the 2,000*l.* had been only to the huſband for life, and afterward the principal to the wife, that would be a ſtrong caſe to ſay, that was not within the intent: but this being only in event, in failure of iſſue of the marriage and of his dying in her life (which happened) I am of opinion, it differs from thoſe caſes. It would be very miſchievous in families to hold it otherwiſe. If the portion ſhould be paid to the huſband to do what he pleaſed with it, and not to be ſettled for benefit of the family, fathers ſhould hardly create ſuch a power; for then the huſband might waſte it. I conſider, that what is ſettled fairly for the family, comes to the benefit of the huſband. It is no objection therefore to the execution of the power as to this; and the plaintiff is intitled to this jointure of of 1000*l. per annum*; which makes an end of the croſs bill.

The next conſideration is, if the plaintiff is intitled to a jointure of 1,000*l. per ann.* (ſuch as it ought to be) what ought it to be, and what is it clear and diſcharged from? The material words are *not exceeding in the clear yearly value*. What is the meaning of thoſe words, and to what time to be applied? The time I will conſider firſt; as to which I am clearly of opinion, that they muſt be lands of this clear yearly value at the time of making the jointure, and that there is no obligation upon the remainder man or lien upon the eſtate to have this jointure continue to be of a clear value of 1,000*l. per annum* during the continuance of the jointure eſtate; and that is always the rule in execution of theſe powers. A man ſeiſed in fee may covenant, that it ſhall always continue of ſuch a value; which covenant will bind his aſſets real and perſonal to make it good. But there is nothing here to bind his eſtate, except according to what is laid down in *Coventry* v. *Coventry*, ſuch a covenant as is a conveyance in Equity: and of that opinion I was in Lady *Blandford*'s caſe; where it was very minutely conſidered as to the great inconvenience in a contrary doctrine; that theſe powers would otherwiſe be executory, fluctuating and deſultory; that none would know when the power was executed; and that new bills muſt be brought, and againſt the remainder man; and it muſt be executed by ſubſequent tenants for life. Are ſubſequent jointreſſes to be called on to make good the firſt jointreſs? That could never be intended; therefore it was the time of the execution: and of that opinion I was in that caſe not only in reſpect of the execution of the power as to charges on the eſtate, but in reſpect of the *quantum* of the land-tax; for though that tax might riſe afterward the *quantum* of the jointure was not to be varied, and a defect in value of the jointure was not to be conſidered becauſe of an addition made to the land-tax afterward; it was ſufficient, that the Maſter ſhould

21 April 1743.

Jointure not varied from alteration of land-tax.

ſee

ſee it exonerated from the land-tax according to the *quantum* of the land tax at the time of the execution and at that rate: for otherwiſe the before-mentioned miſchief would follow, that whenever the land-tax varied, that is a defect in value of the jointure, and therefore they may come into a Court of Equity to make it good againſt the remainder man. It is impoſſible that it could be meant to execute the power in that looſe manner. It was argued for the plaintiff, that it is taken upon that foot: but as to the diſtinction taken that this power is not well executed, and therefore remaining to be executed, the court is to decree, according to the value of the land at the time this power is now to be executed; I cannot agree to that doctrine: for Sir *Brownlow Sherrard* did by his firſt ſettlement execute his power as to 800*l.* *per annum*, and make a legal ſettlement of theſe lands by virtue of his power, and covenant to ſettle more to make up a jointure of 1,000*l.* *per annum*; which he endeavoured to do in a ſubſequent ſettlement: therefore I cannot take it, that this jointure is to be conſidered of the value, whenever a new conveyance is to be made; but I will conſider, how the lands were as to value at the time of the execution of that power in 1738: that is the true rule as to that part of the caſe. As to the other part indeed of the additional jointure in 1745, Sir *Brownlow Sherrard* has gone ſomething farther, and declared his intent to execute the power as far as he poſſibly could do; and he was in the right therein, for a great fortune was brought by this wife, and ſhe relieved him out of difficulties: but the queſtion is, what he had power to do? As to that I muſt take that ſettlement not in the ſhape he has put it, which is to make a jointure equal to 1,000*l.* *per ann.* rent charge. I cannot take it in that way; ſo far therefore the power is defectively executed as not being warranted in point of law. But according to my opinion in *Hervey v. Hervey** I ſhall take that to be good ſo far, as his power will warrant: therefore it muſt be part of theſe lands to the amount of 200*l.* *per ann.* to make it up.

* 1739. Power defectively executed, good ſo far as warranted. *See Dought. R. 3. ed. 624.*

The great queſtion then, and the only queſtion upon which a difficulty ariſes, is, from what charges, impoſitions, or outgoings this eſtate ought to be diſcharged at the time of making the jointure? As to the lands of 800*l.* *per annum* it ought to be conſidered, as things ſtood at the time of making that ſettlement or execution of the power in 1738. What it is to be diſcharged from, depends on the conſtruction of thoſe words *not exceeding* &c. For the plaintiff it is inſiſted, that it muſt be *clear* of every out-going, clear at leaſt as far as that jointure of Lady *Blandford's*; in which caſe the words were, *clear of any taxes, charges, or impoſitions*; ſo that there was an expreſs diſcharge from taxes; if there

there had not, by virtue of the word *charges* I ſhould not have taken it to be clear of taxes. The plaintiff inſiſts, this is to be clear of taxes; and if it is within the power, they are in the right of it: which brings it to the conſtruction of the words. I am of opinion, theſe general words are not to be extended to the land-tax; but I am of opinion, the true conſtruction is that rule I laid down in Lady *Blandford*'s caſe; where I held, that the meaſure of charges to be deducted was to be taken, as things ſtood at the time of the execution of the power, and was to be free from all charges uſually allowed between buyer and ſeller of eſtates, and all parliamentary impoſitions at that time: but that was becauſe of the words. But where nothing but the word *clear* is uſed, it is a right rule to conſtrue it, as it would be between buyer and ſeller of eſtates. *Clear* muſt not mean all out-goings like a rent-charge, as loſſes by tenants and management, to which a rent-charge is not liable. Then what is the rule to go by? What would be underſtood between buyer and ſeller; that is all repriſes and incumbrances, and all extraordinary charges, unuſual and not agreeable to the courſe of the country; and then the land-tax is not to be conſidered. It is true, the land-tax is to be conſidered as a burthen: but it is contingent in itſelf, becauſe the value is contingent, and therefore that is a reaſon, it ought to be taken in: but it is not taken in between buyer and ſeller. Tithe is ſuch, as it ought to be free from. So of a fee-farm rent payable to the Duke of *Leeds*; which is an incumbrance by private title. Then as to poor-rates and church-levies, if in this country the uſual courſe of letting eſtates had been to let them ſubject to theſe charges (as it is in the *Weſtern* counties and ſome others) I ſhould have taken this power in that ſenſe, that the jointure ſhould be charged with theſe payments; for when a perſon creates a power, and makes a jointure as a clear jointure in lands, it muſt be conſidered as lands of a clear rent according to the courſe of letting in that country, and not to be liable to extraordinary charges by contract. It is proved in this country to be uſual to let them be diſcharged from theſe burthens; but in this eſtate theſe burthens are paid by the landlord; and the rents of the eſtate are raiſed to the tenant in proportion. If then the father thought fit to let the eſtate ſo as to increaſe the nominal value of it, and gives a power to make a jointure, that is no reaſon to burthen the jointure with it, but as the uſual and ordinary method is of letting theſe lands.

Decree therefore Lady *Sherrard* intitled to a jointure not exceeding the clear yearly value of 1,000*l.* *per annum* at the time of the ſettlements made; that is, clear of incumbrances and all other charges which by the courſe and uſage of the country, in which

which the lands lye, ought to be borne by the tenant; but ſubject to the land-tax and all other outgoings, which according to ſuch courſe of the country ought to be borne by the landlord.

The croſs bill is diſmiſſed; and ſo much of the original as ſought to make up any deficiency in the *Lobthorp* eſtate according to Lady *Blandford*'s caſe, and Lady *Clifford* v. *Lord Burlington*, 2 *Ver.* 379. that where upon an execution of a jointure in purſuance of a power there is a deficiency in the value of land, it may be made up in a court of equity; the parties agreeing to take that eſtate to be of the value of 800*l. per ann.* as *His Lordſhip* thought, there was reaſonable evidence thereof deducting the above charges, rather than enter into an inquiry about it.

Deficiency of jointure in purſuance of a power, made up in equity.

Attorney General *verſus* Corporation of Bedford, Caſe 173.

July 15, 1754.

NEW College in Oxford having by a charter particular powers given them as to the grammar-ſchool at *Bedford*, ſuch as the removing the maſter for miſbehaviour, *&c.* as to any thing of that kind, *Lord Chancellor* thought, it would be too much for this court to do any thing, though they were not appointed general viſitors: but as to the management of the revenue of this ſchool this court might.

Charity. This court will not interfere, where particular powers by charter as to a ſchool, tho' not appointing general viſitors: but will as to management of the revenue; and make the maſter on colluſion with uſher account for 15 years ſalary.

The college in 1739. having appointed one of their fellows maſter, and alſo another fellow uſher (which never had been done before) with a yearly ſalary, it appeared in evidence, that the uſher never did any thing at the ſchool, but conſtantly reſided at the college, and never received any part of that ſalary, but the maſter put that intirely in his pocket. He admitted by his anſwer, that at the time of making him maſter there were but three boys in the ſchool, and at the time of his anſwer but eleven; and now inſiſted, that he looked on himſelf as accountable to the uſher for that money; and that having lived upon it, he ſhould not now be obliged to refund it; for which purpoſe there were ſeveral caſes, where after having ſpent the money, and eat and drank it, the court would not oblige to refund.

LORD CHANCELLOR.

How can it be ſaid, he lived upon it, ſince he looked upon himſelf as accountable to the uſher all along? And the uſher certainly did not live upon it, not having received any part. It was plainly a colluſion between the maſter and uſher, and a contrivance to make this a *ſinecure*; for in fact there has been hitherto no occaſion

for an uſher where there were ſo few ſcholars: therefore as there was this colluſion, the court muſt in point of juſtice and for the ſake of the precedent order him to account for this ſalary for 15 years back; for it muſt be now taken to be remaining in his hands; and for whoſe benefit? Surely rather for the charity than the uſher, who did nothing: and though it is ſaid, this account will ruin the maſter, I cannot help that; but muſt do it for the ſake of juſtice and precedent.

Caſe 174. Chapman *verſus* Smith, *July* 17, 1754.

Modus. Tithes.

THE bill was brought by the rector of the pariſh of *Alſtringham* in *Kent* for payment of tithes in kind for the lands therein.

Modus of 9d. per acre marſh land, except when ſown with corn or planted with hops, not determined without trial.

The defence ſet up in the anſwer was a *modus* in this pariſh time out of mind, that all occupiers in the marſh-lands in this pariſh have always paid, or ought to pay, yearly to the rector 9*d. per* acre and no more for every acre of marſh-land within the ſaid pariſh and the tithable places thereof in their reſpective poſſeſſions, except when ſown with corn, grain, flax, or planted with hops, as a *modus* and in lieu of all tithe of hay and paſture and all ſmall tithes except flax, hemp, and hops; and ſo after that rate for a greater or leſs quantity than an acre of marſh-land.

For plaintiff it was reſted on the rector's title.

For defendant it was argued, that this was a good *modus* and well laid; and a caſe cited in *Exchequer* in 1726. where a bill was brought by *Richard Bate* as rector of the pariſh of *Wareborn*, the very next to this pariſh, for tithes in kind; and a croſs bill by Sir *Charles Sedley* and others inhabitants of that pariſh to eſtabliſh a *modus* of one ſhilling for every acre of marſh-land, laying it exactly as the preſent *modus*. Two iſſues were directed; and upon the equity reſerved after the trial the *modus* was eſtabliſhed. This is a precedent both in law and equity, ſhewing this as a *modus* well laid, and that in a court where theſe kind of bills are particularly attended to; and anſwers the objection of being too rank, this being laid only at 9*d. per* acre.

Ante.

In *Evans* v. *Price and Richards*, 26 *October* 1747. *Your Lordſhip* held, that the rankneſs of a *modus* is not to be judged by compariſon of the ſum to the rent reſerved on the land, but to the value of the land; and that where it was neceſſary in point of proof, the court would direct that matter to be tried, but otherwiſe the court itſelf would judge of it. Theſe lands lye in *Romney Marſh*, to preſerve which the owners are at a very great expence, and therefore it is probable that they made this compoſition, and then the variation,

tion of the land is not a reaſon to ſay, this is a rank *modus*; for the value of lands depends on particular huſbandry, and is uncertain. It is impoſſible to ſay, what the value of the lands was at the time of this compoſition; and reaſonable to think, a proper valuation was then made, and a proper reſervation. The alteration in different times from the cheapneſs of money and value of land would deſtroy all *moduſes* of this kind. In *2 Will.* 572. this precedent in 1726. ſeems to be cited by *Forteſcue* J. and weight laid upon it. As to its not being laid conſiſtent, and impoſſible to be time immemorial, becauſe it excepts hops, things newly introduced, not exiſting at the time this compoſition was ſuppoſed to be made, no ſuch objection was taken in that caſe in the *Exchequer*; and it is not probable, it would have eſcaped that court, if ſuch had lain. Though the law has determined, that hops were introduced in Q. *Elizabeth*'s time into this country, they were probably known and exiſted before, though in ſmall quantities. The exception was introduced for benefit of the rector, who is ſuppoſed by the *modus* to receive the full value, as tithes in kind were then worth. It is not material that all the witneſſes do not call it a *modus*; for it may be laid as a ſum annually paid without calling it a *modus*; and it is hard to require exact preciſion in traditional evidence. Where the *modus* itſelf is reaſonable, reaſonable evidence is a ground for it. There is no evidence of payment of tithes in kind. This rector and his predeceſſors have agreed to this *modus*.

For plaintiff. The plaintiff need only ſhew, that he is rector; which by law intitles him *prima facie* to all manner of tithes, unleſs ſome legal bar is ſet up, which here is a *modus*: but it is neither proved in fact, nor good in law, and is contradicted by records. The difference to the plaintiff is, whether he ſhall receive the whole or half of his tithe? If things of this kind are not broke in upon, the clergy's revenue may be deſtroyed by compoſitions. It depends on this; whether it is ſuch a *modus* as could have commencement beyond time of memony, or a modern compoſition within time of memory? According to Lord *Coke*'s definition, a *modus* and compoſition are the ſame, only that by length of time one is run into ſomething certain, an abſolute bar, not to be broke by either parſon or occupier. A compoſition is ſuch an agreement, as ſince the diſabling ſtatutes muſt be made by the parſon alone; and it may be, and is in general, a running compoſition from year to year, exactly like leaſes from year to year; ſo that on either ſide, if the compoſition is not intended to be continued, you muſt give notice at the beginning of a year; and ſo of a leaſe. A *modus* and compoſition differ materially in this; that one is a certain payment beyond time of memory: the other equally certain, but within memory. The one may be broke by the parties; the other not. A *modus* may indeed ceaſe and revive according to the different ſpecies of culture,

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in which the land is imployed; and therefore where it is ſet up, that when ſown with corn it ſhall be tithe in kind, when turned into hay it ſhall be ſatisfied by way of *modus*; courts of law and this court have held, it may ceaſe and revive; and ſo far this *modus* is proper. But the objections to it are, firſt it is rank, and appears ſo large, that impoſſible it could be time out of mind. The court will always deſtroy ſuch a *modus* on the face of it, where it runs ſo high, and goes ſo near the value of the tithe in kind. Every *modus* certainly preſumes an original agreement before the diſabling ſtatutes, by parſon, patron, and ordinary; and ſince by parſon alone. That commencement then muſt be preſumed conſiſtent with right reaſon; and the court will not preſume, that the pariſhioners (in whoſe favour all theſe original contracts between them and the parſon are) made ſuch a compoſition, as was of more value than the tithes. The payments muſt be always in money, this being paſture-tithe; which is always pecuniary, cannot be ſpecifick, and the only tithe in the kingdom which is not ſpecifick. It is not to be conceived, that 9*d.* would be paid, if the real tithe did not amount to half that. The value of an acre to ſupport this as a reaſonable compoſition at the time, muſt have been 7*s.* and 6*d.* So high a *modus* creates a ſtrong preſumption, that it was made not beyond time of memory. The law fixes that to a certain period in the time of K. *R.* 1. ſince whoſe death it is above 560 years. This then muſt be preſumed an agreement before that time to pay 9*d.* *per* acre. In fact in the time of K. *H.* 8. theſe lands were valued at 2*s.* *per* acre; as appears from ſeveral records, particularly from a ſurvey then taken, now produced out of the augmentation-office. How long this notion of the rankneſs of a *modus* has prevailed, may not be known; but in *Layfield Rector of Chidding fold in Surry* v. *Delap*, *Hil.* 1697, the defendant inſiſted on a *modus* of 3*d.* for a lamb. The court held, that was too much, and could not be; for that a lamb was not worth 2*s.* and 6*d.* in that country. 2 *Ld. Ray.* 1163. ſhews how far back the opinions in the *Exchequer* have gone, and a *modus* was held too high by *Powel* J. and ſeveral afterward. *Benſon* v. *Watkins*, *Hil.* 3 G. 1. (*Bun.* 10.) *Franklyn* v. *Jenkins*, *Trin.* 7 G. 1. (*Bun.* 78.) Yet in 1731. or thereabout, *Giffard Rector of Stoke in Surry* v. *Webb*, a *modus* of 3*d.* for a lamb was ſet up; it was ſent by the Barons *Carter* and *Thompſon* to be tried; and on appeal that decree, was affirmed. It has indeed been ſaid, Lord *Talbot* was againſt that decree. The next objection, and which deſtroys the *modus* on the face of it, is from the exception of tithe of hops; which ſhews it a compoſition, the law taking notice that they are a modern invention, coming in in Q. *Elizabeth*'s time; though perhaps they exiſted before, for there is a ſtatute in the time of *H.* 8. prohibiting them as a venomous weed. It could not then be an agreement time out of mind; of which the judges take notice; and therefore prohibition was denied, 1 *Sid.* 443. 1 *Ven.* 61. The exception

muſt be coeval with the preſcription, which preſumes an agreement at firſt by proper authority of patron, rector, and ordinary to take a pecuniary payment in lieu of tithes in kind. The exception muſt be taken entire with the *modus*; for the court never ſevers a *modus*, or conſiders one part as good and another as bad. Hops being alleged as part of the deſcription, it is thereby as much *felo de ſe*, as if laid particularly and preciſely for hops; which is never allowed. In *Ferch* v. *Gee*, *Hil.* 1698. according to Lord Chief Baron *Dodd*'s manuſcript on a bill by the impropriator of the pariſh of *Offham* in *Kent* the queſtion was in what manner hops are to be paid, and whether a *modus* could be good of the tithe of hops: and it was held not, nor a *modus extra ponendi*: ſo afterward in *Connor* v. *Spratling*, *Trin.* 1703. becauſe hops are a new plantation. There are but two kind of tithes; great and ſmall: the great are only four; corn, grain, hay, and wood; all the reſt ſmall: and there can hardly be a new great tithe. And it is now determined fully by *Your Lordſhip* in the caſe of potatoes in *Smith* v. *Wyat* upon a precedent in the *Exchequer*, that great and ſmall tithes depend not on the value or quantity, but on the nature of the thing; and therefore though the whole farm is turned into ſmall tithe, it will be ſtill ſmall. Hay is a great tithe; there has been a modern culture, which makes that hay, which not ſo formerly; as foreign graſs, lucern, &c. a *modus* for tithe-hay covers it, becauſe it is the ſame ſort of thing now. A great difference has been made in ſmall tithes with regard to culture, being formerly only uſed in gardens: yet if there is a *modus* for all ſmall tithes, that preſcription cannot be thereby overturned: the *modus* is applicable to whatever ſmall tithes ſhall ariſe. A *modus* in lieu of all ſmall tithes whatever will cover hops as well as others: though you cannot preſcribe in lieu of hops particularly. Hops will paſs under a grant *de minutis decimis*. An antient grant of all ſmall tithes would now carry any new invented tithe. In *Franklyn* v. *Jenkins* one point was, whether a vicarage, endowed before time of memory *de minutis decimis*, was intitled to tithe of hops; and ſo held (*Bun.* 79.) Next how appears it on the evidence. The parol evidence to ſupport it varies, is inaccurate and contradictory. Very few of the witneſſes call it a *modus*. They, that do, prove it directly contrary to the laying it; one calls it a rate: a rate and compoſition are the ſame. Lord *Talbot* has ſaid, if the witneſſes would not call it a *modus*, he would not. Then as to the receipts or written evidence, they are alway expreſſly ſaid to be for a *modus*, where there is one: but theſe, though varying in other reſpects, are all for the *tithe*: and *tithes* and *modus* are oppoſite terms. The ſurvey 26 *H.* 8. read for the plaintiff, is the beſt evidence, it is accurate, and proves, that the lands in *Romney Marſh* were then only of the value of 2*s.* *per* acre. As to the precedent in the *Exchequer*, it appears, that court would have held contrary, if the ſame matter had been laid before them, as is here. Until

that time and later the *Exchequer* ſent iſſues to try a *modus*, without firſt determining whether it was good in law or not. This court has brought them to alter that, and alſo another practice of taking an account of tithes down to the time of the Maſter's report. It was there by *Page* and *Gilbert* directed to be tried, though *Price* held it in point of law a bad *modus*; and it was tried before *Eyre* J. who upon this record in the time of *H.* 8. being read, held, that the commiſſion ſhould be produced, and that if it was, he would certainly over-rule the *modus*. It is now ſettled by all the judges, that that is wrong. It is not neceſſary, eſpecially at this diſtance of time, to produce the commiſſion; and moſt of them are not in being. *Your Lordſhip* has allowed miniſters accounts and a ſurvey without producing the commiſſion; and it would be ſtrange to ſay, the parties are not to have the benefit of theſe ſurveys, becauſe the commiſſion is not to be found. Upon the equity reſerved, where the validity of the *modus* only was argued (for the fact had been eſtabliſhed) the court not only diſmiſſed the bill with coſts, as the plaintiff had failed on the trial and no motion for new trial, but alſo the croſs bill with coſts; which was an odd determination, decreeing neither way. They were not clearly of opinion, that it was a good *modus* on the face of it: but do not ſay it was bad. The parties plainly did not look on it as determined; for they brought new bills afterward. But the rector in his anſwer to the bill for eſtabliſhment of the *modus*, not caring to engage further, agreed to accept the compoſition, but not to eſtabliſh the *modus*. If then that had been a precedent in this very pariſh, it would not conclude his ſucceſſor, becauſe it was colluſion: but being in a different pariſh can be no precedent to a *modus* in another: ſo that as a precedent in fact, it will not bind; as a precedent in point of law it was not determined: and the opinion of *Eyre* J. was, that if that could be proved, which is proved here from the augmentation-office, he would over-rule the *modus*.

LORD CHANCELLOR.

Upon the reaſon of the thing and the authorities that have been; and others which I will men ion, I cannot determine this matter without a trial. The court certainly ought to ſupport the rights of the church: and not to allow any *modus* or cuſtomary payment that by the rules of law is not to be ſupported. At the ſame time the court ought not, eſpecially in caſes of very extenſive conſequences, lightly to overturn and overthrow cuſtomary payments, that have prevailed for a great tract of years, which is commonly called time out of mind or the memory of man: though I do not mean ſtrictly according to the notion of law before the time of the tranſportion of K. *R.* 1. I take it, that the queſtion before the court in this caſe is of very extenſive conſequence, through a great tract of country

country. It appears in this caſe and in former caſes in *Weſtminſter Hall*, that it extends and runs through ſeveral pariſhes in this country. When therefore that is the caſe, and no inſtance or tradition of payment of tithes in kind, in this pariſh for a great tract of years, purchaſers have come in and paid a price for the land according to thoſe cuſtomary payments; and it would vary and alter the value of their property to overturn or overthrow them; which is a reaſon, why theſe objections to them ſhould be very well weighed and conſidered, and that they ſhould not be too lightly overturned; as has been done in ſome inſtances.

Rector of common right intitled to tithe in kind.

The plaintiff upon his general right as rector is certainly intitled to his demand of tithes in kind of theſe lands, if no bar is ſhewn. The defence inſiſted upon is a *modus*; and undoubtedly as againſt the right of the rector it is incumbent on the defendant to maintain that *modus* in point of law and fact.

There are two general objections againſt allowing this *modus*, which are inſiſted upon as ſufficient to over-rule it now. Firſt that it is not ſufficiently proved in point of fact. The other that if it was ſo, yet that it is not good in point of law; which objection in point of law divides itſelf into two objections. The firſt a general one, that the affirmative part of the *modus*, the payment of 9*d.* *per* acre, cannot have ſubſiſted time out of mind, of which the court is bound to take notice; and that it cannot have ſubſiſted time out of mind from the alteration of the value of money; becauſe 9*d.* *per* acre muſt be much above the value of the tithe of this land at the time this *modus* or compoſition muſt be ſuppoſed to commence; which the law of *England* by a pretty extraordinary law (and which, I believe, no other country does) makes from the tranſportation of *R.* 1. to the *Holy Land*. The other is an objection tending to the ſame thing; that this *modus* cannot have ſubſiſted time out of mind, becauſe there is an exception of a product and culture, which was not and could not be in uſe at the time when it was ſuppoſed to commence; and that this exception, being part of the agreement, muſt be coeval with the agreement itſelf: which ſhews, it could not be an agreement time out of mind.

Limitation of time from tranſportation of R. 1. to Holy Land.

Firſt as to the proof of the *modus* in point of fact; as to which many obſervations are made on the part of the plaintiff, and certainly in caſes of this kind theſe obſervations have been frequently made, and have juſtly had weight; that there is a great variation in the proof; that none of the receipts call it a *modus*; only two of the witneſſes call it ſo; the others ſay, there have been ſuch payments for tithe generally; and one calls it a compoſition; and Lord *Talbot* has ſaid, he would not call it a *modus*, if none of the witneſſes would. If not one, that might be a material obſervation:

but

but that, I am of opinion, is too ſlight an obſervation in general, that becauſe theſe witneſſes (who are *lay gens*) do not make uſe of a legal, technical, word, that cuſtomary payment ſhall be overruled. The queſtion is upon the fact: the law makes the inference. Next that the receipts do not call it a *modus*, and that they are very nice in taking receipts. Very often miniſters will not call it a *modus* in the receipt; becauſe they will not prejudice their ſucceſſors, tho' they will give a receipt for the ſum as uſual. In very few inſtances will the rector ſubmit to call it a *modus* in the receipt; and if he will not, the pariſhioner cannot compel him; but muſt ſubmit, or elſe pay without a receipt. And that ſort of evidence is in ſome meaſure ſtrengthened by a letter of the plaintiff's, in which he does not (and very rightly) call it a *modus*, but inſiſts on this payment as the payment uſually made for this land formerly, and upon an account and payment to be made up on that foot as the right he inſiſted upon: whereas he might have demanded an account and ſatisfaction for tithe in kind, if this was not a compoſition or *modus*, that bound him. But as to all theſe obſervations I ſhould have laid much more ſtreſs on them, if there was any evidence for the plaintiff either of actual payment of tithe in kind or of a tradition thereof for this marſh land; of which there is none, either of the fact of payment of tithe in kind or any tradition from any ancient perſons; which is proper evidence in caſes of cuſtom and uſage. Then the poſitive proof on one ſide is ſtrengthened by the weakneſs or want of poſitive proof (which implies a negative) on the other ſide. It is determining caſes not on the merits, but according to the critical penning of depoſitions. The want of any evidence, not only of payment of tithe in kind but of any tradition, takes off the weight of the obſervation, that this might have commenced within a ſhort ſpace of time; for then ſome tradition would have been ſhewn, that tithe in kind had been ever paid, or even inſiſted upon or demanded: but there is none. If therefore it reſted on the proof, it is impoſſible to ſay, that a decree muſt be made for payment of tithe in kind; which as at preſent I cannot allow.

Hops began in Elizabeth's time, to be propagated, but exiſted before in ſmall quantities.

But the moſt ſtrong objections are thoſe in point of law ariſing from facts; but ſuch facts as, it is inſiſted upon, the court is bound to take notice of. Firſt as to the exception of hops, which has ſomething material in it; for hops are always allowed to have been introduced in modern times, that is modern in reſpect of long antiquity. They began to be uſed and propagated in Queen *Elizabeth*'s time, and exiſted in this kingdom in *Philip* and *Mary*'s time and before; as appears from the ſtatute in the reign of *H.* 8. therefore they were here: but here, as tobacco is here, planted for curioſity and in ſmall quantities: but they were in this kingdom to a certain degree before *Elizabeth*'s time, though *non conſtat* how far. Is it poſſible, there ſhould be ſuch an exception in the

beginning? or does the making this exception overturn the affirmative part of the *modus*? Suppoſe the agreement was to pay nine pence *per* acre for all ſmall tithes of this land, except ſuch ſmall tithes as ſhall be afterward introduced: that would be certainly a good agreement. Then inſtead of laying it in thoſe general words they have ſpecified it with ſuch a ſort of product, as theſe lands probably will be tilled with. But it is too much to lay ſuch weight on this objection to overturn this *modus*, when I ſee what has already paſſed. I allow that caſe of *Bates* in the *Exchequer* not to be ſuch an authority as to bind in the preſent caſe; and it ſeems as odd a proceeding, as I ever ſaw in a court of equity. Iſſues were firſt directed on both bills; and afterward the trial was ſo had as not to determine the merits of the caſe, which the court expects after a trial; but it went off upon a nice objection in point of evidence, that the plaintiff in the original bill offered a record or ſurvey in the time of *H.* 8. (which now has been read) and which was over-ruled by the Judge, and the merits were not entered into. Evidence is not to be deſtroyed, becauſe ſome part of it is loſt; for the law is not ſo unreaſonable as not to ſuffer it to be ſupplied, if loſt: but upon its coming back upon the equity reſerved the court diſmiſſed the bill with coſts in law and Equity, and diſmiſſed the croſs-bill with coſts only in equity: the reaſon of which was perhaps, that there was no application by the plaintiff *Bates* for a new trial, and as a verdict was againſt him, his bill was conſequently to be diſmiſſed, unleſs he prayed an account on the foot of the *modus*; which, I preſume, he did not think fit to do: and, I preſume, the croſs-bill was diſmiſſed, becauſe the court did not think, the verdict as found was upon the merits, or ſufficient to make a decree to eſtabliſh the *modus*. But why it was diſmiſſed with coſts, I do not know; unleſs the court had a mind to ſet the coſts on one ſide againſt the other. But afterward a bill is brought by the landholder to eſtabliſh this as a *modus*; and the defendant thereto by his anſwer ſays, he acquieſces to take the payment on that foot; but did not conſent, it ſhould be eſtabliſhed: yet the court did think fit to eſtabliſh it as a *modus*. I believe, I ſhould hardly have done that. But however it was only to eſtabliſh it as between the then rector and pariſhioner; for that decree could not afterward bind all the ſubſequent incumbents; becauſe that muſt be on a *modus* eſtabliſhed on proof and on the mere right of the caſe, which was not entered into. The only uſe therefore, I can make of that precedent, is this; it is evidence to me of the opinion of a very learned court, when *C. Baron Pengelly* (who was a very learned Judge) preſided there, that this inſerting the exception in the laying the *modus*, which was exactly juſt the ſame as in the preſent caſe, was not ſufficient to impeach and over turn the *modus* in point of law; and as that is a very nice objection, and may

Modus to bind ſucceſſor muſt be eſtabliſhed on proof, and on the mere right.

be accounted for in different ways, and there being that opinion of that court, I ſhall be of opinion not to over-rule the *modus* upon that.

Modus too rank, too high or near the value of the tithe not allowed. But a difference where for land or a particular product.

The more material objection is upon the affirmative part of the *modus* itſelf, whether it is not too rank? It is inſiſted upon as too high in point of value, and therefore that the court is bound to take notice of it, and ought to over-rule it. That doctrine has certainly prevailed in ſeveral caſes, and, I believe, more ſtrongly ſince the publication of Biſhop *Fleetwood*'s book; for before that, I believe theſe things were not ſo commonly known. That objection, though founded in fact, is taken to be allowed by the court without a jury: that objection has been more commonly allowed as to the value of particular things, for which the *modus* has been ſet up, as where it is ſo much for a ſheep, or lamb, or a particular kind of product, the value of which may be ſhewn at theſe times: but it may differ as to a *modus* ſet up as to the value of lands, becauſe ſeveral incidents and accidents may attend that: the alteration of traffick or commerce, or of the culture of land, either improved or falling in value by accident, that makes ſuch a *modus* more uncertain than in reſpect of the value of a particular kind of product, as calves, ſheep, lambs, and things of that kind. Therefore, though this objection is taken in point of law for the judgment of the court, the court does not always proceed as bound to determine it that way, but has conſidered it as a matter of fact proper for a jury. And this plaintiff has conſidered it as ſuch, and has entered into proof of the fact, that is by records, to ſhew the value of the land in the time of *H.* 8. I cannot make a certain inference from thence. It is a material evidence to be ſure; and more light might have been had in that caſe of *Warehorn*, if Juſtice *Eyre* had let that in. But when ſuch commiſſioners are ever employed to make this valuation, I believe, this valuation is never carried to the height; and that in the time of *H.* 8. has been always thought not to be carried to the height. Compare it with valuations in modern times, as on the augmentation of the *Queen*'s bounty, not valued at a third part: and yet, I believe, they did not go ſtricter than in that of *H.* 8. I uſe this in this manner, not to throw it off, only to ſhew this is not concluſive evidence. Then the queſtion is, whether it is not fit for me to do, as the Court of *Exchequer* did in the caſe of *Warehorn*, to direct an iſſue? and in that reſpect I have directed an inquiry to be made into that caſe of the Rector of *Stoke*, which was firſt in the *Exchequer*; where *Giffard* brought his bill for tithe in kind, and particularly for tithe of lambs. The defendants there inſiſted, that neither he nor his predeceſſors were intitled to receive that becauſe of an antient uſage or cuſtom in that pariſh, that every occupier having land paid three

three pence and no more as a *modus* in full ſatisfaction of the tithe of ſuch lamb. The court did not determine it on the hearing, but directed a trial: but the plaintiff did not proceed to trial; and the court ordered the iſſue to be taken *pro confeſſo*, and afterward ordered his bill to be diſmiſſed. From that he appealed; and the reaſon given for his appeal (as appears from the caſe) was, that the court ought not to have directed an iſſue, but ſhould have over-ruled this *modus* as too rank becauſe of the ancient price of cattle and other commodities, ſo that a lamb would not be worth formerly more than ſix pence; and that it was proved to be only a modern compoſition. The anſwer given to that is, that the ground for that objection ſeemed to be, that the *modus* was ſo great and ſo near the value of the tithable matters, for which paid, that it muſt be a modern compoſition conſidering the decreaſe of the value of coin: but that this objection ariſing on matter of fact was very proper to be conſidered by a jury. It was heard in 1735; at which I was not preſent, being then in the *King's Bench*. The *Lords* affirmed the decree; and therefore affirmed, that the ſending it to an iſſue was proper and right. I ſent to Mr. *Philip Ward*, ſon of *Lord Chief Baron Ward* (and who is a very good repertory of caſes in the *Exchequer*) to know, what caſes upon this head had been in the *Exchequer*; and the caſe of *Layfield* v. *Delap* was ſent to me, and alſo another, which comes up to the preſent, is very like it, and in the ſame country, of *Graſtomb* v. *Jefferies*, 17 *Nov.* 1687; which is before any of the caſes, that have been cited upon this head; and the account of it is this. It begins with ſaying, This is a *Kentiſh* cauſe, and the plaintiff demanded tithe in kind for marſh-land. The defendant alleged a *modus* or cuſtom time out of mind to pay twelve pence *per* acre for all marſh land within the pariſh in lieu of all tithes. Proof was made of this payment for forty or fifty years; and upon this, and as there was no proof of payment of tithe in kind, a trial was prayed to be directed: but the court denied the trial, and declared the pretended *modus* or cuſtom to be void, as it was proved, that the marſh land was rented at ſo much *per* acre, that it was not poſſible, nor could a reaſonable intendment be made, that the *modus* or cuſtom time out of mind could be; and therefore the court over-ruled the *modus*, and ſaid, that the court uſually over-ruled a *modus*, which ſeemed too great, and which did not ſeem reaſonable to the value. But *nota*, (and for this I cite it) this cauſe was reheard upon the defendant's motion, and the *modus* was ſent to a trial at law by a *Middleſex* jury; but it does not appear, what was done afterward. The uſe I make of this caſe, is to ſhew, that the taking this ſort of objection, founded on the height of the ſum, to be a matter of fact in ſome caſes for the conſideration of a jury is not a new invention, nor firſt introduced in that caſe of *Giffard* or that of *Bate*, but was done

done by the court in 1687 on great conſideration; for it was twice before them. On the firſt hearing they were of a contrary opinion, and over-ruled the *modus* upon the arguing it; but upon rehearing and reconſidering they reverſed their own decree, and directed a trial. And I am of opinion, that in theſe kind of caſes it is very fit to do ſo; and more ſo in a caſe where it concerns the height of a *modus* in reſpect of the value of land than any other, eſpecially of land which has been greatly improving and improved for ſeveral years. *Romney Marſh* is the firſt level, which was banked in from the ſea; and the laws of the *Sewers* and more modern laws have a reference to that of *Romney*, and make that the rule. There is a poſſibility, where lands were of little value at the time, but were improving and incloſing, the parſon, patron, and ordinary might come to an agreement to give from that time much more than the tithe was, in order to prevent the parſon's demanding tithe in kind afterward, when the lands were greatly improved at their expence. It is like the caſe, where a commonage is incloſed at a great expence, and much more is by agreement given to the parſon than his tithe in kind at the preſent, becauſe it is to prevent his receiving tithe according to the improved value.

Therefore I will direct it to be tried; but the queſtion is, where it is to be tried? according to *Graſcomb* v. *Jefferies* it is proper to try it in *London* or *Middleſex*. *Romney Marſh* is very extenſive; and hardly a gentleman in *Kent*, who has not an eſtate there; which, I preſume, was the reaſon of directing it in that manner in that caſe. If I had not found this precedent, I probably ſhould not have thought ſo ill of my countrymen as to do it. Let it be tried in *London* upon an iſſue, whether the occupiers of the marſh land in this pariſh have paid, *&c.* juſt as it is laid in the anſwer: but the defendant in this court muſt be plaintiff at law, becauſe the iſſue is upon him.

Caſe 175. How *verſus* Weldon and Edwards, *July* 17, 1754.

At the Rolls.

Aſſignment of Sailors ſhare of prize money at great under value, ſet aſide for fraud, but to ſtand as ſecurity for what really advanced: and a

THE plaintiff was a land-man on board one of the ſhips, which in 1745 made the great capture, which put into *Kinſale* in *Ireland*; and for 123*l.* 15*s.* 0*d.* ſterl. agreed with *Weldon* for a ſale of his intereſt, which, as was now confeſſed, amounted to 457*l.* In *Sept.* 1745 the prizes came to *Briſtol*. In *Oct.* the money was received by the managers. On *Nov.* 15, 1745, *Edwards* by a deed, reciting the deed-poll of *Auguſt* by which the plaintiff aſſigned his ſhare for the conſideration therein mentioned,

tioned, purchaſes it from *Weldon*; who covenants, that *How* was well intitled, and that *Weldon* had good right to aſſign, with covenant for further aſſurance, and warrant againſt all perſons; and he appoints *Edwards* as his attorney to receive from the managers all bounty money, prize money, ſmart money, tickets, and all other ſums of money due to *How* and the other perſons owners of the ſhare. This aſſignment was accompanied with a bond of the ſame date by *Weldon* and a ſurety in a ſum equivalent to the purchaſe money for *Weldon*'s performance of the covenants; and two ſhares are aſſigned over as a collateral ſecurity to indemnify *Edwards* againſt any claim ſet up by any other, and to make him ſafe in the quiet enjoyment of theſe ſhares. There was afterward a re-aſſignment to *Weldon*; who upon this bill to ſet aſide the ſale now made default.

ſecond aſſignee ſtood in the ſame place as the firſt.

For defendant Edwards it was inſiſted, he is a purchaſer for valuable conſideration without notice of *Weldon*'s fraud; and that in all the caſes cited for plaintiff there were badges of fraud affecting the defendant himſelf. As *Brown* v. *Newman* in 1745, where *Foley* the purchaſer was affected with all the fraud of *Newman*. In the caſe of Mr. *Fitzgerald* he was no purchaſer; he only received the money as agent for the perſon, againſt whom the bill was brought, having accounted for it with his correſpondent in *Ireland*: but the reaſon he was charged, was, that he owed a duty from his having notice not to part with that money; therefore the parting with it was a breach of truſt; and in that light was the decree againſt him. But there is no caſe, where a purchaſer for valuable conſideration from a perſon guilty of fraud without notice of that fraud ſhould be affected therewith. Notice alone of the undervalue is not ſufficient to impeach a contract. In *Baldwin* v. *Rochfort*, *Nov.* 11, 1748, *Lord Chancellor* held, that undervalue, though an ingredient, was not the ſame in the law of *England* as in the civil law.

Ante.
Taylour v. Rochfort, 18 May 1751.

Sir *Thomas Clarke*, *Maſter of the Rolls*,

It muſt be firſt determined, whether the bill of ſale or aſſignment to *Weldon*, the original tranſactor, is in ſuch a light in a court of equity as to ſtand or be ſet aſide; that is, be converted into a ſecurity for what was really and *bona fide* paid, though it was an abſolute ſecurity at firſt? Next whether, if the plaintiff would have been intitled againſt *Weldon*, had he alone been concerned, the aſſignment to *Edwards* will ſtand in his way?

The plaintiff's equity againſt *Weldon* is founded on the common and known principle, an inſtrument obtained from him by fraud and impoſition; the actual proofs of which fraud are

charges in the bill of *suggestio falsi et suppressio veri*, admitted by *Edwards* (for *Weldon* makes default) to be made out by evidence; and being the same as in all the other cases, I shall only allude to them; *viz.* as to the circumstances and situation of the prize and of the plaintiff when he made the sale, from its being in jeopardy on account of the owner's being pricked run, &c. But the more material part is from the other circumstances upon the general head of equity arising partly from the person with whom the transaction was, and beside the value of the thing purchased. It is reasonable to consider the vendor at least in as favourable a light as a young heir. I am warranted in saying that, by what has been often said in cases of this kind, and what has been done by the legislature itself; which has considered them as a race of men loose and unthinking, who will almost for nothing part with what they have acquired perhaps with their blood; therefore are they restrained by two acts of parliament, the last of which was 20 *G.* 2. Then the price, for which the share was parted with, is about a fourth part. By the rules of the Civil Law if half had been paid, it would have been a mere nullity. Our law differs from that; but though the inadequateness of the value will not of itself be sufficient to set aside the contract, yet it is a very material ingredient, and with other things will go a great way toward it. It was a very odious case on the part of *Weldon*; and admitted to be a gross fraud, and the circumstances are the same as in the other cases, in which the bills of sale are set aside; and the risk and hazard at the time of *Weldon*'s purchase, and the uncertainty whether it would turn out any thing in the event on account of claims set up, were greatly misrepresented, and ought not to have more weight than in the other cases, where the same objection is made; and as to the contingency whether the money would ever come safe, insurances were made upon it. No doubt then, but if he now appeared, and made defence, unless something more particular than in former instances, there must have been a decree against him.

Seamen considered as young heirs.

Contracts at half value set aside in the civil law: Not so here: but it is a material ingredient.

Next whether *Edwards* is in a like condition or better than *Weldon*, will depend on the general rules and principles laid down, and on the application of them to this particular case, *viz.* that here is *dolus in re ipsa*, and *dolus circuitu non purgatur*; which is true, if admitted with allowance; and it is laid down by Lord *Bacon* not as a general rule, but as an exception to a general rule. It is insisted for defendant, that if seamen are to be favoured, fair purchasers are as much; and that mere inadequateness or smallness of Price is not of itself sufficient to impeach a purchase; and that a legal interest differs from a mere equity. All these principles are true, as laid down generally; but to judge how far they are applicable consider the particular case made. It is *prima facie*

ſuch a ſtrong defence, a fair purchaſe for valuable conſideration without any notice of plaintiff's claim or right at the time or before payment of the purchaſe money. The deed, under which defendant claims, certainly is greatly more extenſive, than *Weldon* had a right to make; and though probably no benefit could accrue to any on account of thoſe other matters in the aſſignment, yet it was truly obſerved in the other caſes, that this ſhewed the intent of vendee to graſp at every thing; and therefore it is not material, whether advantage did in fact accrue from them. No great ſtreſs is to be laid on the covenants, though the warranty is very extenſive, and goes much further than uſual; nor upon the bond. But though of no great weight ſingly, yet *juncta juvant*. But the collateral ſecurity ſhews ſtrongly, how it ſtruck *Edwards*, the ſuppoſed purchaſer at the time. It was ſaid, this was but a prudent precaution by a purchaſer to ſecure himſelf againſt the event. If it is ſuch a precaution, as a vendee would deſire, it is ſuch, as in a common caſe neither he could require, nor a vendor comply with; for it amounts to a ſale of ſhares for money for his own preſent occaſions, and the purchaſer requires to lock up ſo much to deprive him of the uſe. Next as to the conſideration. There is a receipt acknowledging the payment. The defendant thought it neceſſary to go further, and properly; therefore examined a witneſs as to the payment by draughts and bond. But that will not prove payment of the money ſo as to make defendant purchaſer for valuable conſideration; defendant therefore endeavoured to make out the payment of the draughts and bond: but only in this way, that *Weldon* owned it. Even at this time the bond may be unſatisfied: but if ſatisfied, it might have been now produced. So that the payment reſts on *Weldon*'s acknowledgment. It is ſaid to be ſufficient to produce the deed and receipt. As between *Weldon* and *Edwards* it would; unleſs *Weldon* had brought a bill to impeach payment of the conſideration, and then it would not be ſufficient againſt him: much leſs againſt a third perſon. *Edwards* endeavours to put himſelf, not in the place of *Weldon* (which would not anſwer his purpoſe) but in a better; therefore it is neceſſary to go further, and make out proof of payment; in which he has materially failed. Next as to notice; it is ſuch a defence, as in moſt inſtances is out of plaintiff's power to produce poſitive witneſſes to falſify, depending generally upon collateral evidence. But the anſwer is obſervable; it denies, that at the execution of the deed they had any notice of the plaintiff's having ſold to *Weldon* under any ſuch circumſtances of fraud as are mentioned in the bill. I muſt conſider this anſwer as if pleaded. Would ſuch a general denial of knowledge of a ſale under particular circumſtances of fraud be ſufficient? The generality of it makes it turn the other way. It is admitted, that *Edwards* had notice of the very inadequate

price

price paid by *Weldon* to the plaintiff; and I cannot agree, that there was no occaſion to inquire further; for it muſt raiſe a ſuſpicion; and it was very natural to aſk, how he came by ſo good a bargain: but the defendant more than ſuſpected; and therefore took the collateral ſecurity beſide. Taking all together a court of equity will be induced ſtrongly to preſume notice of another title.

I have hitherto proceeded on a ſuppoſition, that the legal right is in *Edwards*, and indeed otherwiſe the queſtion of notice could not have been at all material; becauſe if they took only an aſſignment of an equity, they would have taken it as in other caſes cloathed with all the circumſtances in the hands of *Weldon*, whether they had notice of the fraud or not, and there is no neceſſity of charging notice of it. But it now appears clearly, that the legal intereſt is in *Weldon* (ſpeaking according to the determinations of the courts of law that by theſe aſſignments the legal title paſſed) for it appears, that there was a reaſſignment of the plaintiff's ſhare to *Weldon*; ſo that *Edwards* had not the legal intereſt; but muſt be conſidered in the ſame light, as *Weldon* himſelf would; and any decree I ſhould now make, in conſequence of that opinion, will in fact be againſt *Weldon* himſelf; which ſatisfies me the better with my preſent opinion: and if the court was to diſmiſs the bill as againſt *Edwards*, it would be a decree in favour of *Weldon*; which would be a great injuſtice to the plaintiff, and is a ſtrong ingredient.

The bill of Sale therefore by the plaintiff to *Weldon* muſt be ſet aſide for fraud and impoſition as an abſolute aſſignment, but ſtand as a ſecurity for ſo much as was *bona fide* advanced; and *Edwards* upon all the circumſtances is not in a better condition. The decree for payment muſt be againſt both jointly; and if ſatisfaction is made by *Edwards*, let him have remedy over, and liberty to proſecute the decree againſt *Weldon*, with coſts juſt in the ſame manner.

Caſe 176. ——————, *July* 18, 1754.

Publiſher of advertiſement as to proceedings in court, committed for contempt: but diſcharged on ſubmiſſion and diſcloſing every thing.

MRS. *Farley*, being committed to the *Fleet* upon motion of the plaintiff, for having publiſhed an advertiſment in the *Briſtol* journal relating to the anſwer in *Chancery* put in by the defendant, Sir *Robert Cann*, now moved to be diſcharged, having paid coſts of the contempt and ſubmitted; as alſo the defendant did, confeſſing the advertiſement was put in at his inſtance; and it was not oppoſed by the plaintiff, who left it to the court.

Lord Chancellor ſaid, his reaſon for committing was not only for the ſake of the party injured by ſuch advertiſement, but for ſake of the publick proceedings in this court to hinder ſuch advertiſments, which tend to prepoſſeſs people as to the proceedings in the court. But as on a proſecution for a libel in *B. R.* for publiſhing a ſcandalous advertiſement, if they confeſs in what manner it was brought to them and every thing about it, that court takes that into conſideration to alleviate the puniſhment; ſo here, though here ignorance of the law is no juſtification for the publiſhing the advertiſement, yet having diſcovered in what manner it was brought to her with other advertiſements, and diſcloſed every thing, it is a ground to alleviate the puniſhment, therefore he granted the motion.

Bullock *verſus* Stones, *July* 19, 1754. Caſe 177.

" I *John Stones* do leave all my real and perſonal eſtate at *Aſhgate* in truſt by *B*, *C*, and *D*; my deſire is, that all my debts and funeral charges be paid, and ſuch legacies as I ſhall after mention." Then after certain directions and legacies he adds, " I deſire, that the heir, which I ſhall hereafter mention, be well brought up with good learning and well educated. Alſo my will and deſire is, that the firſt ſon lawfully begotten of *John Stones* the file-cutter, when he comes to 21, ſhall have all my eſtate real and perſonal at *Aſhgate* and his heirs male for ever: and as there is coal on the land, if it can be let for forty or fifty pounds an acre, the mortgage debt may be got paid off."

Deviſe of real and perſonal to firſt ſon of A. when he ſhall attain 21; the profits of the perſonal accumulates. As to the real, it is a good executory deviſe: but the meſne profits deſcend to heir at law. *See however 1. Ver. 485. & ante. 122.*

John Stones the file-cutter, the defendant, was heir at law to the teſtator, had no ſon at preſent, and was not yet of age.

The firſt queſtion was, whether there was any deviſe to the truſtees? Next whether this was a good executory deviſe to the firſt ſon of *John Stones* at twenty-one? Next as to the profits in mean time, whether the heir at law was intitled thereto only, until he has a ſon born, and to veſt in ſuch ſon immediately on his birth? But this it was ſaid, could never be the meaning; for that would be providing for the ſon, and at the ſame time preventing *John Stones* from marrying; therefore they belonged to him, until he has a ſon, who attains twenty-one.

LORD CHANCELLOR.

The perſonal eſtate paſſes by this will to the truſtees firſt for payment of debts: but the whole ſurplus of that will belong to the ſon of *John Stones*, when that ſon attains twenty-one; which is a reaſonable compaſs of time for ſuch a bequeſt to take place; and until then the profits of that perſonal eſtate will accumulate, and the heir at law cannot claim any thing of that.

But as to the real eſtate firſt I am of opinion, it paſſes by the deviſe to theſe truſtees; and that there are proper deviſing words, though it is not ſaid, "I deviſe to them;" for it is in an inaccurate manner *by* them: but that muſt be conſtrued with the ſubſequent acts to be done by them; *viz.* "I give my real eſtate on truſt, that the rents and profits may be applied by thoſe truſtees in ſuch and ſuch a manner;" then they muſt have the real eſtate for that purpoſe; and, I think, in point of law it will amount to a deviſe to them. The queſtion then is as to the truſt; and application of the rents and profits. It is an executory deviſe of the truſt eſtate to the firſt ſon of *John Stones*, when he comes to the age of twenty-one; which is a good executory deviſe according to the later determinations; for in *Gore* v. *Gore* it was ſettled ſolemnly, that ſuch an executory deviſe is good even of a legal eſtate; and there is no difference as to that, becauſe it does not tend to a perpetuity, only ſuſpending the power of alienation ſo long as the law would ſuſpend it; becauſe until twenty-one he could not alienate it. Where then are the rents and profits to go? Where there is an executory deviſe, whether of a legal eſtate or a truſt eſtate in this court, the rents and profits go to the heir at law; becauſe the legal eſtate in the one caſe, or truſt in the other, deſcend in mean time to the heir at law. But I am of opinion, that this intermediate intereſt or benefit, ariſing to the heir at law as to the profits of this eſtate, will determine upon his having a ſon; for that ſon's education, which he has expreſsly directed, muſt come out of the rents and profits of the eſtate; that cannot be, if another perſon is to have the benefit thereof. Therefore the conſtruction of the will muſt be, that this heir, whom he has inſtituted, ſhall have the benefit of theſe rents and profits from the time of his birth, at leaſt ſo far as his maintenance and education goes. What the ſurplus afterward will be, does not appear; but probably nothing. But the conveyance of the eſtate and the poſſeſſion muſt be ſuſpended until he attains twenty-one.

Archer

Archer *verſus* Pope, *July* 19, 1754. Caſe 178.

Bond by huſband reciting agreement to ſettle wife's eſtate, the wife not an executing party. By her acts after his death ſhe bound herſelf to a performance.

GARCHER, previous to his marriage with *Anne Price*, executes a bond, which recited the intended marriage; and that whereas *Anne Price* is intitled to 800*l.* or ſome eſtate in land or houſes after the death of her mother *Sarah Price*, which ſaid ſum or eſtate, or whatever ſum or ſums the huſband ſhall be intitled to, is agreed to be ſettled to the uſes following; to the uſes of her and the children of the marriage, and afterward to the right heirs of the huſband; but the wife was not an executing party thereto. Upon that the marriage was had. In the life of the huſband the eſtate fell into poſſeſſion, and was a real eſtate. The huſband makes his will, in which he recites the bond, and deviſes the inheritance of the eſtate back to his wife, and all other his eſtates real and perſonal, and makes her executrix. She proves the will ſoon after his death, and marries *Peter Pope*.

After her death a bill was brought by her two ſons by *Archer* againſt the ſecond huſband to have the benefit of the agreement entered into between their father and mother, and to reſtrain the defendant from proceeding at law againſt this eſtate as tenant by courteſy.

His Lordſhip thought, that as the intereſts of the two plaintiffs were incompatible, one of them, the elder brother, ſhould be made a defendant. This was done by an amended bill.

Evidence.

The plaintiff offering to read the examination of another defendant *Harriſon*, who was alſo a defendant to the original bill, it was objected to on the part of *Pope*; as this would give *Harriſon* an opportunity of contradicting, what he had ſworn by his former anſwer, would deſtroy the rules as to publication paſſing in a cauſe, and open a door to colluſion; and that on the part of *Pope* new proof could not have been entered into; although it was allowed, croſs interrogatories might have been exhibited.

LORD CHANCELLOR.

Where a cauſe ſtands over to make or add new defendants, and on

When a cauſe comes on to a hearing, and the court either for an improper arrangement of parties, or in a ſtronger caſe for the want of parties, directs the cauſe to ſtand over with liberty to make new defendants or add parties, in which there is frequently

amendment publication is open, it ſeems, that all the parties may enter into a new examination, and that a new examination of a defendant to original bill may be read againſt another defendant.

quently an occaſion to re-examine; the queſtion is, whether all the parties are not parties to that re-examination? I doubt they muſt neceſſarily be ſo. The bringing new parties before the court may make it neceſſary for all of them to enter into proofs. When there muſt be a new examination, and by amendment of the bill, publication is open, then why cannot all parties enter into a new examination? If indeed the court ſees a contrivance, the court would meet with that ſome way or other; but there is nothing of that here: it was an objection made by the court. However this evidence certainly may be read againſt the other defendant, the infant elder brother of the plaintiff; and then the court may judge of it.

For Plaintiff. This agreement was reduced into writing, and the marriage had in conſequence of it; and the parties are only miſtaken in point of form, in thinking it ſufficient for the huſband only to covenant, and therefore the wife did not ſign it. It is common where a huſband makes a ſettlement on the wife, by way of bond to the wife, which is void at law, ſo that no uſe can be made of it, yet this court decrees it on foundation of the agreement.

For defendant Pope. He has now the legal eſtate as tenant by courteſy; which right is endeavoured to be taken out of him by a ſuppoſed equitable agreement. The new evidence read is not admiſſible againſt him. The wife ſhall not be tied down to bind her land by any inſtrument in writing not ſigned by her. One view of the ſtat. of frauds was, that agreements muſt be certain; but another view, that the aſſent of the parties muſt appear thereto in writing. She never joined in executing the bond, her aſſent does not appear; nor is her huſband's will binding upon, nor can it affect her, in Law or equity.

LORD CHANCELLOR.

In formal marriage agreements decreed notwithſtanding ſtatute of frauds upon acquieſcence and acts in conſequence of it, though not ſigned by one party, or th ugh an infant.

This bill is in nature of a bill for ſpecifick performance of an agreement, which being only ſigned by the huſband, the queſtion is, whether it is ſufficient to bind the wife or not? There are ſeveral inſtances of very informal, incorrect, and looſe agreements on marriage, and where the parties have not been all bound, as things ſtood originally, yet after a marriage had, and acquieſcence, and acts done in conſequence of it, this court has decreed them, and that notwithſtanding the ſtatute of frauds; becauſe all agreements in part performed, or performed on one ſide, the court carries into execution on the other. The wife is not an executing party to the

bond, which contains a recital of an agreement for ſettling her eſtate, nor conſequently to the agreement: but the bond was fairly made and before marriage, and the wife was of full age, and fully conuſant of the tranſaction; as appears on the evidence. It plainly proceeded on an uncertainty of the parties, of what nature and ſpecies the wife's fortune conſiſted, whether money or land. All ſhe was intitled to, was after her mother's life, who was not privy to the marriage. The bond recites an agreement with ſomebody; and *Pope* admits by his anſwer, that there was an agreement. Then there muſt be two parties to that agreement; which muſt be ſomebody intereſted in it, either the wife herſelf or ſome one for her. Though *Pope* has endeavoured to abate from that by ſaying, he does not know from whom the firſt propoſal came, that is not material, ſince there was an agreement: although his admiſſion will not indeed bind the heir at law. Nothing was done during the huſband's life: it appears, he intended to act fairly at the time of making his will, and therefore has recited the bond in his will, and has cured what had the only appearance of hardſhip in this bond, and given the inheritance of the eſtate back to the wife, if no children, which by the bond was to go to the huſband. Taking it upon the bond only, if nothing more was in the caſe, it would be difficult to ſay, that the wife ſhould be bound by this bond; becauſe, if it is abſtractedly taken on the inſtrument, ſhe was no party; and the ſtatute of frauds ſays, it muſt be ſigned by the party, who is to be bound. But notwithſtanding the words in the ſtatute of frauds, if there is a marriage-agreement, by which one party only is bound or ſigns, if the other parties act under that, and ſubmit and aſſent they ſhall be bound by it. I may put ſeveral caſes both on real and perſonal eſtate on this head. Firſt as to perſonal eſtate; a man has made a ſettlement on his wife on marriage; and her perſonal eſtate has conſiſted of leaſes for years, mortgages, or things in action; he dies; the wife ſurviving is intitled to her own ſpecies of her perſonal eſtate, or any choſes in action, or leaſehold eſtate, or mortgages: yet notwithſtanding if the wife, though an infant at the time of the marriage, has inſiſted on the ſettlement made by the huſband on the marriage, and taken the profits of it, and benefit and enjoyment of it, ſhe is bound by that, and the repreſentative of the huſband is intitled; and the court will compel her to part with it for benefit of the huſband's eſtate. So if a freeman of *London* makes a will contrary to the cuſtom, and dies; though the wife is not perhaps executrix, nor does ſo ſtrong an act, as is done here by her proving the will, but has acted in this manner without declaring one way on the other; the court will not ſuffer the repreſentative of the wife to inſiſt on the cuſtom, in contradiction to what was done by her; and that in caſes where, if the wife had been before the court, ſhe might have had an election; therefore if ſhe has done it for a ſhort time only, that acquieſcence ſhall bind

So on will by huſband contrary to cuſtom of London: wife by her acts may be bound.

bind her and her representatives; and it would be very mischievous, if the court should suffer her representatives to take it up in prejudice of the children, &c. These are instances of personal estate: but I will put the case of a real estate. Suppose a woman an infant is married, and intitled to a small real estate of inheritance, and the husband in consideration of that real estate, and that he shall have and enjoy the inheritance for his own benefit, settles on that wife a provision by way of jointure, whether of land or personal estate is immaterial, and dies, and she after his death takes to that provision so made for her and enjoys it, and afterward dies; I am of opinion, the court would not suffer her heir at law to insist upon the inheritance of that real estate by descent from her, but would hold her heir at law bound by her subsequent agreement to that marriage-agreement; and that she had bound herself by her own acts, and departed from her interest in that real estate, and would decree her heir at law to be a trustee for the heir at law of the husband, and that agreeable to the rules of equity; and I believe, has been so held.* If that be so, consider how far that goes in the present case. These instances, and the reason on which they depend, prove, that a wife may be bound by such agreement before marriage though not an executing party within the statute of frauds, nay though a person not capable to do so. This was not in all events that case; because no settlement was made by this agreement before marriage on the part of the husband; for it is merely an agreement to settle the estate of the wife, nothing moving from him. This might amount to an agreement to bind himself to oblige the wife to do it. But it does not rest on this only; for it goes farther, and the will must be taken into consideration; which makes it a mixed and very special case. The question will be, whether her proving this will, reciting the condition of the bond, is not an evidence of her assent, when she was free and sole, after the death of her husband, to this agreement to settle her own estate for benefit of herself and her children. Now without going into the evidence of the defendant *Harrison* (which is to be sure a very strong proof of her declarations) she not only proved but acted under the will, and possessed this personal estate of her husband; in what manner she possessed it, does not appear: but if she enjoyed any part of his personal estate after his death under the will, I shall be of opinion, that was a submission and agreement to this settlement. It goes on both parts, I have been speaking of; on that part which relates to *Noys* v. *Mordaunt* and the other cases on that head, where a man will take under a will in one instance, whether personal or real estate, he shall not dispute the will;

* It was said to be so held in the case of *Felton Harvey*.

will, and on the other part of the caſe whereby it appears, ſhe was conſtant of it, evidence ariſes of her intent. If then this was her intent, and by her expreſs acts ſhe has declared it, that will bind every body coming after her. The tenant by courteſy is equally bound to make good this agreement, if ſhe was bound herſelf. The only matter of doubt might be, how far ſhe had bound herſelf by her acts. I do not know, but it might be too hard to ſay, that barely by proving it a feme ſhould be bound. It was proved very ſoon after; and perhaps ſhe might not know the ſtate of her huſband's affairs. If therefore the ſecond huſband inſiſts on it, I will direct an inquiry, what acts were done by her toward ſubmitting to the will and as an evidence thereof. I mean the general acting under the will and taking the eſtate, ſuch acts as poſſeſſing the goods to her own uſe: but do not mean by way of giving her an election now. But that inquiry will be at peril of coſts.

The inquiry not being inſiſted upon, it was declared, that by her acts ſhewing her acquieſcence under the agreement in the condition in the bond, and alſo her ſubmiſſion to the will, ſhe had bound herſelf to the performance of the ſaid agreement; and therefore it ought to be carried into execution againſt the defendants; and the eſtate equally divided between the two children.

Whithorn *verſus* Harris, *July* 20, 1754. Caſe 179.

Near relations in a will, ſuch as within ſtat. of diſtribution.

Elizab. Whitborne deviſes thus; "*Item*, I give and bequeath to all and every perſon and perſons, who are near relations to "me, if any ſuch there be, the ſum of 250*l.* to be paid them "within a year after my deceaſe; and if there ſhould be any ſuch "perſon or perſons, who are related to me, and do not apply for "payment of the ſaid ſum within a year after my deceaſe, in "ſuch caſe I give the ſaid ſum to my two executors."

The plaintiffs firſt couſins of teſtatrix, applied within the year after an advertiſement by the executors. No nearer relations applied, but ſome doubt had been, whether ſecond couſins ſhould not be included as near relations.

Lord Chancellor declared, that ſuch relations only, as would be intitled to a diſtributive ſhare of her perſonal eſtate according to the ſtatute for ſettling inteſtate eſtates, were within the deſcription of near relations intitled to it; and ordered it to be paid to the plaintiffs.

Chilliner

Case 180. **Chilliner *versus* Chilliner, *July* 20, 1754.**

THE bill was for the execution of a marriage-agreement by conveyance of lands pursuant thereto.

On marriage the two fathers agree to settle lands. One does so; the other gives a bond of 600 l. with 1200 l. penalty if he does not. He has not election afterward to forfeit the 600 l. or settle, the settlement being the primary agreement, and the 600 l. only a penalty or further security.

On the marriage the father of the wife and the father of the husband agree each to convey certain lands to be settled. The wife's father does make the conveyance; but the husband's father not doing so at the same time, gives a bond for the payment of 600 *l.* to the wife's father, his executors or administrators, in the penalty of 1200 *l.* if he did not convey his part of the lands.

After death of the wife the issue of the marriage brought this bill against the husband and his father.

Objected for defendants, that the wife's father did not perform the whole of the agreement on his part; for that part of his estate yet remained to be conveyed; and next, that the defendant had an election either to settle the lands, or forfeit the 600 *l.*

For plaintiff. There is no evidence that the wife's father did not convey the whole: but supposing there was, it is totally immaterial to the plaintiff, who has a right to come against the other, though one of the contracting parties should fail to perform his part in pursuance of the marriage-agreement: as was on full consideration held by *Your Lordship* in *Harvey* v. *Astley*, that issue of the marriage may come against either parent to have it performed, notwithstanding the other parent has refused to execute his part. It shall be executed as far as it can. In this, marriage-agreements differ from all others; for if there are mutual agreements between two, who contract with each other, the whole shall be executed together, not in part; they shall not be left to their cross remedies in equity as at law: but it is very different in marriage-agreements. This was not at the time of the marriage reduced into writing; but it was in part performed, and it is reduced into writing by the bond. Next, wherever an agreement is secured by the sanction of a forfeiture, in this court the party shall be compelled specifically to perform though it would be most for his benefit to forfeit.

28 March 1748.

LORD CHANCELLOR.

I have very little doubt, upon what is the true construction of this agreement: though I do not know, but it may be of more consequence to other cases. I mean from the nature of the case, whether this

this ſort of proviſion ſhall be conſidered as an election, or by way of penalty; for agreements are frequently entered into with ſome ſort of proviſion or by way of penalty in caſe the agreement is not performed. The general queſtion, whether the defendant has an election or option to ſettle the lands agreed in the bond to be ſettled, or to pay the penalty of 600*l.* will depend on the conſideration, what was primarily and originally the intent of the agreement; whether it was, that the lands ſhould be ſettled, and this 600*l.* only to be conſidered as a penalty or further ſecurity for it; or whether it was agreed and ſtipulated, that either the one or the other was to be the proviſion for the huſband and wife and iſſue of the marriage? I am of opinion, that I muſt conſider the agreement to ſettle the lands as the primary and original agreement, and that the other was only by way of further ſecurity or penalty, (call it what you will) and an inforcing the making that ſettlement. The court has in ſtronger inſtances taken it in this ſenſe, when expreſſed in a disjunctive manner; particularly in the caſe of Lord and Lady *Coventry*; in which the articles on marriage were to ſettle lands and tenements compriſed in his power, *or otherwiſe*, as he ſhould think fit: the queſtion was between Lord and Lady *Coventry* in the firſt inſtance; and next between Lord *Coventry* and the repreſentative of the huſband of Lady *Coventry*, whether this was ſuch a covenant, as amounted to a kind of execution of the power in a court of equity ſo as to bind the eſtate againſt the remainder-man; or whether the remainder-man had not a right to ſay, he was not bound? The court there held, that Lady *Coventry* was intitled to have her jointure ſettled out of the lands within the power; becauſe that appeared the original and primary agreement and intent of the parties; and that the going on afterward, and ſaying *or otherwiſe*, was only meant by way of further ſecurity to her to reſort to the real or perſonal aſſets of her huſband. In that caſe it might be ſaid, that an election was given to Lord *Coventry*, which election he had not made, and that the remainder-man by reaſon of that disjunctive was not bound abſolutely, and therefore it ought to come out of Lord *Coventry*'s own eſtate: yet notwithſtanding, the court held Lady *Coventry* intitled as aforeſaid according to the primary intent. That goes a great way as to the reaſoning in the preſent caſe. To go by ſteps; ſuppoſe this agreement which is contained in the condition of the bond, (which is a common, but inaccurate way of making marriage agreements; and this is inaccurately expreſſed although the inte t of the parties appear), had been in articles inſtead of the condition of a bond, and an expreſs direction in the ſame words as it is here, that the huſband and his father covenanted to ſettle theſe lands in ſuch a time, or in default thereof that then they ſhall pay 600*l.* ſuppoſe all this had been in articles; the conſtruction, the court would have made, would not be, that this gave an election to the huſband or his father to ſettle the lands or pay 600*l.* certainly not:

not: but the court would without hesitation say, that this was an agreement to settle the lands, and that the payment of 600*l.* was only a penalty, if they did not settle in a certain time, and nothing else. If this would be so, then there is no ground to make a different construction, when this is contained in the condition of a bond. But on the part of the defendants a circumstance is made use of and very properly, from that form of working it up; that if this was a penalty, what occasion was there for making a further penalty of 1200*l.* and that is the only circumstance, that tends to the favour of the defendants in this cause: but on considering the whole I think that barely an inaccuracy in framing the agreement, and that no such intent or construction could be drawn from it, as is drawn for the defendant. They had made an agreement before marriage to settle the lands (as I must take it, for it is so recited) and if no settlement this penalty: they reduce this into a bond: what ground is there to shew, they intended this 600*l.* a satisfaction? If indeed it could be shewn, that no good title could be made, and that the defect of performance arose from inability; that they might have in view: but not if the husband or his father had had it in their power to make a settlement. For that reason I asked, what was the value; and it appears to be 80*l. per annum* subject only to the payment of 200*l.* which is vastly more than 600*l.* and then it cannot be thought, they meant to defeat the whole agreement, and to give an alternative to the husband or his father to perform one or the other. There could be no doubt, what election they would make; for the estate is near treble the value. That shews, that could not be the intent; because it was no option, as the weight of advantage on one side so far preponderates. Beside no trust is declared as to this 600*l.* but it is to be paid to the wife's father, his executors or administrators. If they intended that 600*l.* in lieu of the settlement, on default of a settlement, they would have gone further; and said, it should be for the husband for life, to the wife for life, and issue of the marriage; it is impossible, but they must have said so. Therefore I am of opinion, I must construe this 600*l.* only a penalty or further security to inforce a performance. Consequently the plaintiff is intitled to have a settlement made of the lands and premises in the bond according to the true intent and meaning of the agreement contained in the condition of the said bond; and a conveyance must be made accordingly.

Case 180. Loder *versus* Loder, *July* 22, 1754.

Portions. Power to father to raise for younger children not exceeding 3000l. if

JOHN LODER devises his *Hinton* estate to his son *Charles* for life with power to raise thereout for portions for younger children a sum not exceeding 3000*l.* to fix the time for payment, and interest for their maintenance not exceeding 5*l. per cent.* and if

Charles ſhould neglect to make an appointment of the portion, the eſtate ſhould ſtand charged with 3000 *l.* as a portion payable to the ſons at twenty-one, to the daughters at twenty-one or marriage; with a clauſe of ſurvivorſhip between them if any died before payable; if all died before, it ſhould ſink.

no appointment, the eſtate charged with 3000 l. for ſons at 21, daughters at 21 or marriage.

Francis, ſecond ſon of *Charles*, attains twenty-one, and by death of his elder brother becomes the eldeſt ſon, but dies in the life of his father.

Nothing veſted in father's life; and repreſentative of one, who attained 21, and became elder, but died in father's life, not intitled to a ſhare.

The queſtion was, whether the plaintiff, widow of *Francis*, was intitled as his repreſentative to a ſhare of this 3000 *l.* as veſted in him and tranſmiſſible? It being an immediate gift to grandchildren not taking through their father, nor to be deveſted out of them by any act of his, but on the events teſtator provided; ſo that upon attaining twenty-one it abſolutely veſted in *Francis*; and it is immaterial that he did not ſurvive his father, whoſe power had no other effect than to ſuſpend the raiſing the charge until his death. Then the accident of becoming eldeſt before will not vary the right; for though there have been ſeveral caſes, where the court has taken great latitude to anſwer the purpoſes of families, in determining that if a younger child became an elder before the time of raiſing the charge intended for younger children; his capacity was defeated; yet in all thoſe caſes the time of veſting and of raiſing was the ſame; for where the time of veſting is firſt, as where a clauſe for maintenance or clauſe of ſurvivorſhip (both which are in this caſe) though the child before the time of payment becomes elder, he will be intitled to the portion. This diſtinction taken in *Graham* v. *Lord Londonderry* in 1746, where there was a truſt term to raiſe portions for younger ſons at twenty-one, for daughters at eighteen or marriage which ſhould firſt happen, with clauſe of ſurvivorſhip and payment of intereſt; the elder died before twenty-one; and Lord *Londonderry*, though become the elder before the time of payment, was held intitled to the portion. The ſame diſtinction was taken in Lord *Teynham* v. *Webb*, 2 *March* 1750-1. *ſ. l. ant. 190.* There are ſeveral caſes where it veſts on a contingency reſpecting the perſon of the legatee, but the raiſing is poſtponed for reaſons reſpecting the fund, though if the party dies before that, it ſhall be raiſed. *King* v. *Withers*, *Butler* v. *Duncomb*, and others. Tal. 117. 1 Wil. 448. *ſee* 3 Ves. Jun. 51. There is no ſuch general rule that the child muſt continue younger to the time of receiving his fortune; and the caſes ſo determined have been not upon the mere event of his becoming an elder, but upon his coming to the family-eſtate.

LORD

LORD CHANCELLOR.

Before I can come at the queſtion, whether any thing was loſt or deveſted out of *Francis*, I muſt firſt ſettle a previous queſtion, whether any thing veſted? And it does not appear, there poſſibly could be upon this charge. It is all left in the power of the father to conſider, how much he would raiſe, as to the eſtate and as to the younger children; and the charge of 3000*l.* is only, in caſe he ſhall neglect to make a direction for appointment of the portion. He might neglect it during his whole life; and might do it by his will; and it was prudent and right; for he might have more children. I lay no weight upon the direction, that it ſhall be payable at twenty-one or marriage, where it is ſubject to ſuch a power as to the *quantum*; becauſe thoſe words are only inſerted to prevent the raiſing it in the mean time, if the father ſhould die before. It could not be known how much was to be raiſed before the death of the father; and before that he is the eldeſt ſon. In *Butler* v. *Duncomb* the father was dead; the ſtate of the fact could not be altered, and therefore it was held veſted. In Lord *Londonderry*'s caſe the charge was certain, and the father might have directed the proportion between the children; but in this caſe the *quantum* of the ſum was abſolutely uncertain; the father's power of reducing it and appointing a leſs ſum, if he thought fit, exiſting during his whole life; and it was variable alſo with reſpect to the younger children. Then it would be making the moſt forced conſtruction to ſay, that any thing veſted, when it was quite uncertain during his life what the ſum ſhould be; and at the time of the execution of the power he was not a younger, but the eldeſt child; which makes it the ſtrongeſt caſe poſſible.

For plaintiff. Then the conſequence might be, that if all the younger children came of age, and left children, but died in life of the father, nothing could be tranſmitted; becauſe nothing veſted in life of the father.

LORD CHANCELLOR.

I will not determine the caſe, you put now; nor do I ſay, that the father could give it unequally. Nothing could veſt during the father's life; becauſe none could ſay, what could veſt; and beſide the objects during his life vary. Then the charge of 3000*l.* ariſes on his making default to charge a leſs ſum: ſuppoſe he had by will executed his power, and directed 3000*l.* or 2500*l.* to be divided among the younger children, he had at that time, and not to the eldeſt ſon: would or could the court have ſet that aſide? The bill muſt be diſmiſſed without coſts.

Berkley *verſus* Ryder, *July* 22, 1752. Caſe 181.

Et e con:

GEORGE RYDER made a ſettlement to ſecure proviſions for his brothers and ſiſters, who were unprovided for by their father, creating a term of 500 years to raiſe 1000*l.* apiece to be paid to his ſiſters upon their reſpective marriages, ſo as they married reſpectively with conſent and approbation of their mother, brother *George*, and the truſtee, the ſurvivor and ſurvivors of them: but if all or any of them ſhould marry without ſuch conſent or approbation, then ſhe or they ſo marrying ſhould not receive the 1,000*l.* nor ſhould any ſum of money be raiſed for her or them ſo marrying without conſent.

Gift on condition not to marry without conſent; where good: where only in terrorem.

Proviſion by a brother for ſiſters unprovided for on their marriage with conſent, otherwiſe not: conſtrued as if by a father: not ſo, if by a mere ſtranger.

The bill was for the payment of 1,000*l.* portion of the plaintiff's wife *Anne* one of the ſiſters.

The fact giving riſe to the queſtion, as ſtated for plaintiffs, was this. Mr. *Berkley*, ſecond ſon of his father, was intitled to 1,500*l. per annum* after his father's death; and living in the neighbourhood a courtſhip between him and the other plaintiff enſued. He was then about nineteen; ſhe was thirty-five; ſo that the diſparity as to the age and fortune was greatly on her ſide. Her mother and brother encouraged ſo advantageous a match; but it was kept a ſecret from his family. The brother died before the marriage, and ſo did the truſtee; ſo that it turns on the privity and approbation of the mother, and her conſent. They were married with licence, and publickly in church; but the mother was not preſent, plainly becauſe of her intimacy with his family: but as ſoon as they were married, ſhe received them into her houſe, gave them her bleſſing and preſents, and was much rejoiced at it. The brother dying juſt before the marriage left a ſon, under age. The plaintiffs applied for this portion to the guardians; who refuſed to let them ſee the ſettlement; and they were willing to wait, until the ſon came of age. He died; and the eſtate came to the defendant at that time abroad. The plaintiffs waited, until he came over; he is now deſirous of taking an advantage of this as a forfeiture, and puts his defence upon the marriage being without conſent, and ſo the 1,000*l.* loſt. The anſwer admits the brother died before the marriage: and yet a croſs-bill is brought to ſhew, that he was alive at the time of the marriage, and that therefore it was ne-

ceſſary to prove his conſent: and there has been a forgery or raſure in the regiſtry to make the marriage appear to be before his death. This 1,000*l.* is in fact the only portion of the wife, being provided for her by a perſon *in loco parentis*, a brother repreſenting his father, who was under an obligation to make a proviſion for them if unprovided by the father; and this court does that by a circuity, by compelling the brother to maintain the child if unprovided for. This is indeed a voluntary proviſion in law; upon terms; and the queſtion is, whether thoſe terms are complied with? The object was to prevent improper matches: this was greatly to her advantage: therefore the mother could not reaſonably have oppoſed it, and the leſs evidence of her conſent will do than if otherwiſe. The declaration of this truſt requires not any particular mode of conſent, but only that a marriage ſhould be had with their privity and approbation, or rather without their diſapprobation. Conſent and approbation are ſynonymous terms. A tacit conſent, not putting a bar, has been determined equal to an open conſent; as the ſuffering others to build on his freehold, where contiguous; a ſon's ſuffering his father's leſſee to build, and afterward diſputing his father's power. *Qui tacet, aſſentire videtur. Qui poteſt, & non prohibet, jubet.* So on endowment *ex aſſenſu patris*, where the father does not expreſsly diſapprove. Here the mother was privy; no evidence of her diſaſſent; and a ſubſequent approbation. This court in conſtruing conſent to marriages has gone very liberally, and always regarded the ſubſtance. There are many caſes, where a privity to the courtſhip with a ſubſequent approbation, determined a conſent. *Meſgret* v. *Meſgret*, 2 *Ver.* 580. *Farmer* v. *Compton*, 1 *Ch. R.* 1. where only a ſubſequent approbation. There have been more modern caſes. *Campbell* v. Lord *Netterville*, in 1737, an appeal to the *Lords* from the *Chancery* in *Ireland*. *Charles Campbel* by will gives to his grand-daughter *Catherine Burton*, who always lived with him, 6,000*l.* to be paid to her at her day of marriage, provided ſhe married with conſent of *Samuel Burton* her father; but if ſhe ſhould die unmarried or without ſuch conſent, then over. The father encouraged propoſals by Lord *Netterville*, repreſenting her fortune to be 15,000*l.* and afterward drew back, becauſe he could not make good his part of the propoſals. They married privately; ſo that in fact there was not the conſent of the father; to cure which, and prevent the forfeiture, articles were framed making a proper ſettlement, and a ſecond marriage was had in face of the church. This was admitted; and the reaſon of the father's drawing back was probably, becauſe the bank, in which he was engaged, was tottering. It was decreed for the portion becauſe of the courtſhip; and becauſe it was a reaſonable and proper match, from which the father but for that circumſtance would not have with-

drawn; and on appeal that decree was affirmed. There was no pretence of any other conſent than his being privy to and encouraging the courtſhip; and all the ſubſequent management did not hurt the caſe. Another caſe in 1738, of *Daly* v. Lord *Clanrickard*, the portion of whoſe ſiſter, Lady *Anne Burk*, was to be paid on marriage with conſent of truſtees, and if without conſent given over. Mr. *Daly* made his addreſſes to her, and propoſed, that his father ſhould ſettle her portion and 4,000 acres worth 1,200*l. per ann.* the truſtees met upon this, and wrote a leter to *Ireland* to inquire into his circumſtances in theſe words; "Though the Lady may marry better, yet we are afraid, it has "gone ſo far, that if the father makes good the terms, we ſhall "be obliged to give conſent." Nothing further was done by the truſtees. The father made good the propoſals; and they married. The queſtion was, whether there was a forfeiture, it being argued that this conſent was extorted, as appeared from that letter? but *Your Lordſhip* held, that though the court would not encourage theſe things, yet in a hard caſe it ought to be liberal in conſtruing ſuch powers, and would conſider the ſubſtance of them; and whether there was any objection to the fortune of the man, which there was not, and would not ſuffer the truſtees being in the place of parents obſtinately to refuſe their conſent, and would not let them retract this conditional conſent (if it may be ſo called) but held it a ſufficient conſent within the truſt, and decreed it accordingly, the match not being unreaſonable upon the propoſals being made good. Theſe caſes ſhew, that queſtions of this kind have been conſidered here; and that the evidence of conſent in this caſe is ſufficient.

LORD CHANCELLOR.

If this portion is not given over, but is to ceaſe, that brings it to the caſe of *Harvey* v. *Aſton*; where the decree was reverſed by me with the aſſiſtance of the Judges. 2 May 1737.

For Plaintiffs. There it was a condition precedent; here ſubſequent. There a marriage with conſent was neceſſary to enable the truſtees to raiſe the money; here it is a defeaſance ſubſequent to the direction to raiſe; a veſted intereſt even before marriage though not payable until then. It is to be raiſed out of truſt of a term, and therefore the conſtruction is different from a will; and though to come out of land, the court has not made the diſtinction ſo ſtrong, that therefore a forfeiture enſues, though not ſo as to perſonal. But here is ſufficient evidence to intitle to this portion, and diſpenſe with actual conſent.

For

For Defendant. This is very ſtale demand, due (if at all due) in 1730. Defendant not ſuſpecting it has married, and ſettled his eſtate. It was a mere voluntary act and bounty of the brother; nothing veſted: they were not to have theſe portions unleſs they married with conſent: otherwiſe nothing was to be raiſed, no maintenance. This is very like *Harvey* v. *Aſton*, where on the appeal Sir *Joſeph Jekyl*'s opinion was over-turned; and all the rules in this court as to raiſing portions were ſettled. *Your Lordſhip* held it not material whether it was given over or not; for that there was no ſuch rule as to portions; it relating only to legacies, and only on conformity to the rules and principles of the Civil Law; and ſettled, that in a legacy out of perſonal eſtate a condition in reſtraint of marriage, whether precedent or ſubſequent, is merely *in terrorem* unleſs a deviſe over; if out of real, this court follows the rule of the Common law, and has ſaid, that though no deviſe over, ſtill the party muſt comply with the condition. Terms are part of the land itſelf, and, when the truſts are at an end, attend the inheritance; are ſubject to the rules of common law and natural equity ariſing on them as the lands themſelves, and not to the civil law. This is a term created out of and attendant upon the inheritance, and different from a chattel which is part of the perſonal. The law requires not any preciſe words to make a condition. This is precedent from the nature of the thing, or elſe a qualification of the event on which the portion is to ariſe; not barely on marriage, but marriage with conſent. It is proved by the regiſter, that the marriage was before the death of the brother. That is ſaid to be a forgery or raſure; but the defendant was not then come over. As to the admiſſion by defendant, he ſaid, he knew nothing of it, but believed, they might be married at that time according to the ſuggeſtion in the bill; ſo that the admiſſion in the anſwer was owing to the following the bill. The court will indeed believe, where a defendant ſays, he believes: but will not go on that, where there is contrary proof, as here from the regiſter, to which the defendant ſent, and thereupon filed a croſs bill. Next as to the mother's conſent: where no preciſe form of conſent is required in ſuch a truſt, the court will receive evidence of implied conſent: but in all the caſes cited it is a poſitive evidence of a previous approbation; not a previous, inferred from acts of ſubſequent approbation. There the court conſidered any thing amounting to evidence of previous conſent as ſufficient: but very different where only to be inferred from ſubſequent approbation. That may indeed afford preſumptive evidence of previous conſent: but not in this caſe. The court conſiders the circumſtances, under which that is offered, and will not always raiſe the ſame preſumption on the ſame evidence, but different

as

as the parties appear in different lights. If this is offered by the iſſue, previous approbation might be inferred from ſubſequent: but from the parties preciſe evidence is expected becauſe of their knowledge. Then the length of time will have great weight, as on all demands in law and equity. The bill was not filed until long after the death of the mother, who might have proved her conſent. The marriage was had in a different pariſh from the mother's; and the plaintiff's evidence ſhews, ſhe knew not of it; and there is proof for defendant, that ſhe declared, ſhe never did conſent. In the anſwer to the croſs bill they do not ſay, they believe, the mother knew it; but that it is the opinion of diſintereſted perſons, and that it is ſuppoſed, ſhe concealed her knowledge. It is ſaid, the ſubſequent conſent is enough, as it is a proper match: but the court will not lay down a different rule for great or inferior people: and the publick advantage requires the ſtrict hand of the court as to marriages.

For defendant it was offered to read the regiſter, and the mother's declarations.

LORD CHANCELLOR.

You can read neither. As to the regiſter, can you bring a croſs bill to bring in queſtion what you have admitted by anſwer to the original? It is a direct admiſſion on oath; and I cannot help it. It would be a very dangerous precedent. If you miſtook, you muſt correct that by moving to amend the anſwer, before you can bring that into the cauſe.

Evidence. You cannot by croſs bill queſtion what is admitted by anſwer; but muſt prove to amend anſwer.

As to the merits, *His Lordſhip* ſaid, it would be very hard on one ſide, that the plaintiffs under all the circumſtances ſhould not in a reaſonable way have this portion: yet there were ſome things on both ſides, which made him have a doubt in his own mind, which he would determine, if the parties could not agree: but aſked, if the defendant would pay the plaintiffs 1,000*l.* with intereſt to a particular time without coſts on either ſide: ſaying he ſhould conſtrue this ſettlement and truſt, juſt as he ſhould have done, if it had been a proviſion by a father, becauſe it ſtands in the ſame ſtate: that there has been a diſtinction, and reaſonably, in the conſtruction of clauſes of this kind in a will or ſettlement by a mere ſtranger without conſideration either of blood or duty to provide: but where a proviſion is by an eldeſt brother for younger children, five of them deſtitute of either portion or maintenance, and nothing but the mother's jointure to ſubſiſt on, he ſhould take it on the foot it had been argued for the plaintiffs, that he is *in loco parentis*, and conſtrue it in the ſame manner.

For Defendant. Application has been made to the two other ſiſters to file bills on the ſame queſtion, and therefore the defendant fears to make the precedent.

LORD CHANCELLOR.

What, I have propoſed, is matter of conſent, and will be no precedent; therefore it is better for the defendant to take it on the foot of conſent.

The propoſal was agreed to. Intereſt ſettled at 4 *per cent.*

Caſe 184. Ex parte Dupleſſis, *July* 22, 1754.

LORD HARDWICKE, LORD CHANCELLOR.

SIR THOMAS PARKER, LORD CHIEF BARON.

Poſt 27 July. PETITION by Mrs. *Roſe Dupleſſis* to ſtay the execution of a commiſſion into *Middleſex* to inquire whether the petitioner was an alien; ſhe having been found not to be an alien upon a former commiſſion by a jury of *Middleſex*.

Lord Chief Baron.

Alien. The firſt queſtion is, whether the finding the petition not to be an alien is concluſive? Secondly, if not, whether the commiſſion is the proper proceeding? Thirdly, whether the crown ſtill by law can have a *melius inquirendum* into the county of *Middleſex*?

Finding not alien not concluſive to the crown: but no new commiſſion; but a melius inquirendum, if ground for it; if again ſo found, concluſive.

For the petitioner has been cited 4 *H.* 7. *c.* 16. and *Brook, Office* 33. that an office ſhall not be taken on a ſurmiſe after an office, which is contrary to the matter of the firſt office, *&c.* and *Dyer* 248, 249, where were three commiſſions upon an inquiſition, and the firſt office allowed, *&c.* On the contrary for the crown it is inſiſted, that an office for the ſubject ſhall not bind any party; for it is only evidence; and in anſwer to 4 *H.* 7. is cited *Brook, Inqueſt* 22, and in anſwer to *Dyer Stamford Prerog.* 52. that a new commiſſion may iſſue. I underſtand that learned authority to mean there a *melius inquirendum*. Several precedents have been left with me; and that of *Anthony Colley* ſeems to be relied on for the crown to ſhew, that there may be a new commiſſion contrary to a former. It was 35 *Eliz.* but thoſe were commiſſions to inquire after the deaths of different perſons, not of one and the ſame perſon: but ſuppoſe they were for one and the ſame perſon, they would be no precedent for the crown in this caſe; becauſe two different claimants may have

two original commiſſions, 7 *Co.* 45. *A.* and there by the commiſſion upon the firſt *John Colley* was found to be ſon and heir of *Anthony*, and that commiſſion was ſued out by him: but the widow ſued out a *mandamus* in behalf of her infant ſon *Anthony*. I apprehend that *Paris Sloughter*'s caſe (which is the true name of it) *Hil.* 7 *J.* 1. and reported 8 *Co.* 168. will in a great meaſure rule the preſent. By thoſe precedents left with me it appears, a *melius inquirendum* has iſſued purſuant to the opinion in *Sloughter*'s caſe. They confirm *Sloughter*'s caſe; and ſhew in a great many inſtances, where after compleat findings upon writs of *diem clauſit extremum & mandamus*, that manors and lands were held of the King or meſne lords in common *ſocage*; writs of *melius inquirendum* have iſſued, and found to be held otherwiſe. In *Mich.* 10 *J.* 1. after the death of *William Nicholſon*. *Mich.* and *Hil.* 18 *J.* 1. on the death of *Rowland Wynne*. *Paſ.* 21 *J.* 1. on the death of *Mathew Rogers*. *Mich.* and *Hil.* 21 *J.* on the death of *William Furneſs*. And *Mich.* and *Hil.* 22 *J.* 1. after death of *Peter Doleman*. Though in other reſpects between a *melius inquirendum* to inquire of the alienage of a particular perſon, and to inquire into tenures, there is a difference; yet as to this, that there may be a finding contradictory to the former, there is no other difference, but that the one relates to land, the other to the perſon; and therefore a *melius inquirendum* may iſſue in this caſe as well as in the caſe of tenures, provided there is ſufficient ground for it. I have in my ſearch met with a caſe or two contrary to *Paris Sloughter*'s. In 2 *And.* 204. it is expreſly held, that where there is a perfect finding on a *diem clauſit extremum* no *melius inquirendum* ſhould go: but the anſwer is, that caſe was in the reign of Q. *Eliz.* and before *Paris Sloughter*'s; which laſt caſe is grounded on great reaſon; for otherwiſe the crown could not be on an equal foot with the ſubject; for the crown could not traverſe, but would be bound by the firſt inquiſition: otherwiſe as to a ſubject: which is Lord *Coke*'s reaſon. Another is the caſe of *Ripley*, 2 *Jo.* 198, where it was held, that no *melius inquirendum* ſhould go: but it was, becauſe the party grieved had remedy by traverſe; therefore that is no authority: for if a *melius inquirendum* is not to go in this caſe, the crown would be concluded by the firſt finding. It is proper to take notice of *Manlove*'s caſe, 2 *Sal.* 469. where it is laid down as a rule, that where an inquiſition is defective and uncertain, that cannot be ſupplied by a *melius inquirendum*: but that where it found ſome well, there may be a *melius inquirendum*. The ſame caſe is in 3 *Mod.* 335, which refers to three books, as authorities for what is laid down, but there does not appear to be any thing in them about it. I am not ſatisfied with the fidelity of this report of what the judges ſaid in *Sal.* and *Mod.* becauſe 3 *Lev.* 288. is ſilent as to this point. *Hob.* 50. ſays, a *melius inquirendum* is a ſupplement to a defect or uncertainty of a former office. And *Finch of the law* 129, 130,

(*cap.*

(*cap.* 23.) ſays, a *melius inquirendum* upon any other defect in the office, as if the office was inſufficient or uncertain, &c. I am of opinion therefore upon theſe authorities and precedents, and the anſwers I have given to thoſe two caſes, that the finding Mrs. *Dupleſſis* not to be an alien is not concluſive to the crown: though I think the new commiſſion has iſſued improperly, and to be ſuperſeded: yet ſtill the crown may have a *melius inquirendum* into *Middleſex*, if there is a ground to grant it. What will be the proper ground to iſſue it, muſt be ſubmitted to the court, when application ſhall be made for it. Upon the whole, if a *melius inquirendum* ſhould iſſue, and Mrs. *Dupleſſis* be again found not to be an alien, it would be concluſive to and bind the crown; and ſo this courſe would not be liable to the inconvenience of commiſſions iſſuing *in infinitum:* but if the contrary is found ſhe may traverſe.

LORD CHANCELLOR.

This has depended longer than I could wiſh: but it was not to be avoided; for at the former hearing it was upon precedents, which could be only found in the books; from which we received no light. Several material precedents for the crown have been laid before us, but not until after laſt *Hilary* term: ſince which this is the firſt opportunity, the court has had to take it into conſideration. Upon the caſes and precedents, as they appear from copies of records left with us, *Lord Chief Baron* has taken great pains; therefore I ſhall contract what I have to ſay into a narrow compaſs.

The queſtions are rightly ſtated. The firſt is, whether the office, which was found on the firſt commiſſion into *Middleſex*, that Mrs. *Dupleſſis* is not an alien born, is concluſive to the crown as to the lands in that county? The ſecond, if that office is not concluſive to the crown as to the lands in that county, what is the regular method of proceeding for the King to have a new inquiry; whether by a new commiſſion (which has iſſued, and is now prayed to be ſuperſeded) or by commiſſion in nature of a *melius inquirendum?* Theſe are the two queſtions; for I take the laſt, though in the disjunctive, as one queſtion.

So little is to be found either on precedents upon record, or of judicial reſolutions, or opinions in books, on this caſe in point upon a commiſſion, whether alien or not alien, that it is agreed on both ſides, and rightly, to argue this on analogy and on the general reaſon on other caſes, as writs of *diem clauſit extremum*, *mandamus*, or commiſſions in nature of ſuch writs to find, who was heir to the King's tenant, and what was the tenure. All the authorities except the *K.* and *Q.* v. *Manlove* have been of ſuch

3 Lev. 288.

caſes;

caſes; and indeed as to the point in queſtion before us, I think the rule properly may and muſt be drawn from caſes of that kind, as they appear in the books and upon records of the proper courts of revenue; for though theſe offices in the caſe of tenures as to the effects and conſequences of it, do not hold throughout in the preſent caſe, yet as to this method of proceeding, and whether the crown is to be concluded by one inquiſition found againſt it, or can have a new commiſſion upon a ſurmiſe contrary to the finding of the firſt, I am of opinion, it will be the ſame, and the law will be the ſame. The material difference between theſe caſes (that is, caſes of offices upon tenures and of offices found upon a commiſſion to find whether a perſon was alien born) turns rather in favour of the crown; for here the King is ſuing; and the finding, when it is for the King in ſuch a commiſſion, is called the King's declaration. I ſay, the King is ſuing for the inheritance of the land, which he claims to be veſted in him by purchaſe of an alien; and if he is to be abſolutely concluded by one finding, he is barred for ever thereby: whereas in caſes on a *diem clauſit extremum* or *mandamus*, the queſtion is only concerning the tenure and ſeigniory, and upon the death of the next tenant the King might have a new writ according to his title: for however it may be ſaid, that the King is concluded, it is only in that inſtance: for on the death of the next tenant he may have a new inquiſition found, in caſe the real title is with him. So that there, in the caſes of inquiſitions on offices upon tenures, the miſchief was only temporary: here, if the doctrine contended for the petitioner was to prevail, the miſchief would be final and perpetual to the crown. To argue this caſe then upon theſe principles I take it (as the Lord *Chief Baron* has done) that the law was ſettled on great conſideration in *Paris Sloughter*'s caſe; and nothing has been done ſince to unſettle it. Before that, it appears from Lord *Coke*'s report and more fully from the caſes laid before us, that the law was ſomewhat unſettled and imperfect upon this queſtion; and therefore Lord *Coke* concludes his report (as is uſual where there is a variety of caſes) that with theſe diverſities all the books are well reconciled: this therefore being a ſolemn determination, and followed (as now appears) by a courſe of precedents on record ſubſequent to it, I need not run back to the original caſes, and examine the firſt foundation of them: for then there would be no end of proceedings, and the law would be unſettled.

Offices on tenures; if found againſt the K. a new inquiſition may be on death of next tenant.
If found not alien, the K. barred for ever.

Taking that to be a full authority, let us conſider, whether that does not furniſh a clear reſolution to all the queſtions before us.

The firſt queſtion is, whether the office found, that Mrs. *Dupleſſis* is not an alien, is concluſive to the crown? What was determined upon that queſtion in *Sloughter*'s caſe? (for now I am proceeding

ceeding on the principle, that this is to be determined by analogy to thoſe caſes on tenures.) In that caſe the court held, the ſecond commiſſion of a *melius inquirendum* was a repugnant commiſſion, and therefore were of opinion to quaſh that *melius inquirendum*, but immediately awarded a new one. One of the points, they determine is, that if a writ of *diem clauſit extremum* or *mandamus* is found againſt the King, there ſhall not be a new writ of that kind awarded, but there may be a *melius inquirendum*; ſo that is a clear and expreſs determination, that the crown is not abſolutely concluded by that finding on that firſt commiſſion; which furniſhes an anſwer to the firſt queſtion in this caſe, whether the King is abſolutely concluded by the finding on the firſt commiſſion; and equally ſo to the firſt part of the alternative in the ſecond queſtion, what was the regular method for the crown to take; for by this determination the King could not have a ſecond original commiſſion, but a *melius inquirendum*; and might have a ſecond *melius inquirendum*, when the firſt was out of the caſe; for when the court were of opinion to quaſh that *melius inquirendum*, becauſe it was abſurd and impoſſible, they awarded a new one, becauſe the firſt was out of the caſe; and that is the general doctrine that is laid down; and the book ſays, it ſtands with reaſon, that as the party may traverſe, when found for the King, ſo when againſt the King, who cannot traverſe, he ſhould have a *melius inquirendum*: ſo that this is a clear authority, unleſs there is ſomething in law-books to overthrow it upon all the queſtions.

But on the part of the petitioner ſeveral objections are made to that determination; eſpecially that it is contrary to former caſes, and particularly to Lady *Dacre*'s caſe, 4 *H.* 7. 16. and *Brook*; *Office* 33, and to *Baſſet*'s caſe, *Dy.* 248.

As to *Dyer* that is plainly diſtinguiſhed from being a caſe where a remedy might be taken by *ſcire facias*; becauſe the King had got poſſeſſion, and there was an *amoveas manus*, in which caſe the King may have a *ſci. fa.* becauſe within the ſtatute of *Lincoln*, 29 *E.* 1. and that was one of the determinations in *Sloughter*'s caſe; for to bring it within the *Stat.* of *Lincoln* there muſt be neceſſarily a ſeiſure and *amoveas manus* in order for the King to take that remedy. But however that is, it appears, that the rules in *Sloughter*'s caſe are ſupported by a courſe of precedents ſubſequent and as many authorities as could be expected; ſince all the laws as to this queſtion of tenures were repealed not many years afterward. If indeed *Sloughter*'s was a ſingle determination contrary to former (which was, what I wanted to have looked into) it would have deſerved leſs weight: but that is not the caſe.

But there are other objections to it, and one more modern authority. Firſt that ſuch rule as is laid down there, of giving the King a privilege to make a ſurmiſe contrary to the firſt finding and upon that a *melius inquirendum*, puts the ſubject on a very unequal foot with the crown; and therefore that theſe proceedings by commiſſions and offices found on them muſt be taken, as they ſtood at common law before the ſtatutes, which give a traverſe on *monſtrans de droit* upon office found; for that thoſe ſtatutes extend only to the party, and not to the King; and that in *Sloughter*'s caſe Lord *Coke* reaſons from the liberty given to the party to traverſe. The next objection was, that if a *melius inquirendum* may be in any caſe, yet not upon a ſurmiſe directly contrary to the fact found by the firſt office. Thirdly, that the objections againſt theſe are the ſtronger, becauſe the conſequence is greatly to the prejudice of the ſubject in order to turn the proof of being a ſubject born upon the party. And the fourth objection was drawn from *Manlove*'s caſe in 1690. which certainly is made, as far as it goes, a great authority.

At common law the ſubject had petition of right: by ſtatute a traverſe.

To conſider the firſt objection, that this puts the ſubject on an unequal foot, becauſe this proceeding muſt be conſidered, as it ſtood at common law. I agree to the principle, upon which it proceeds; that as to the crown this muſt be taken, as it ſtood at common law, that the King is not within thoſe ſtatutes, which give that benefit: but as it ſtood at common law, it put the crown on an equal foot only with the ſubject: for the ſubject had one remedy at common law, a petition of right. It is true, that was not ſo facile a remedy, as the ſtatutes afterward gave, of traverſing the *monſtrans de droit:* this was an eaſier remedy, and was therefore given by thoſe ſtatutes: but the petition of right was a legal remedy, and therefore it is not to be ſaid, that, becauſe a man has no remedy but by petition of right, therefore he had none: for when a proper caſe was laid before the King, the crown was bound to give a proper anſwer, and a commiſſion was to iſſue under the great ſeal to inquire into the fact of the petition and title of the party ſet forth therein, (I am conſidering the caſe as at common law) and the conſequence was, that after the ſubject had obtained the uſual anſwer, which the crown was bound to give, he was to have a commiſſion to inquire. There was a ſecond commiſſion to the party, though the firſt was found againſt him. What was the caſe of the crown? The King could not petition himſelf; therefore he was upon a proper ſuggeſtion to have a ſecond commiſſion out of the court of *Chancery* under the great ſeal in like manner: but not on petition, becauſe impoſſible. Lord *Coke*'s arguments in *Sloughter*'s caſe, which are drawn from the ſtatutes, which give *traverſe* to a *monſtrans de droit*, are only uſed as auxiliary

ary arguments adding further ſtrength to the King's having that remedy; and certainly right therein; for if the King had that right before, then, when thoſe ſtatutes had given an additional one to the ſubject, it ſtrengthens the argument, that the King ſhould not be precluded by one.

Melius Inquirendum on ſurmiſe contrary to firſt finding.

The ſecond objection was, that a *melius inquirendum* cannot be on a ſurmiſe directly contrary to the fact found by the firſt office. But this objection is only encountering the authority of *Sloughter's* caſe, and not reaſoning or citing authorities againſt it; and alſo encountering the authority of other books. *Stamf. ch.* 17, 52, 53. has been cited; which is a clear authority, that a new commiſſion of ſome kind may iſſue upon a ſurmiſe even contrary to the firſt; and I underſtand that book, as Lord *Chief Baron* does, that it means a *melius inquirendum*. But to that I will add *Fitz. Nat. Brevium* upon the writ of *diem clauſit extremum, quæ plura*; which was to find, if there were any more lands, of which the party died ſeiſed, than were included in that commiſſion. It is in the *new edition* 572, 573. Upon what he ſays there, an obſervation may be made, perhaps of curioſity. *Fitzherbert* makes a diſtinction between a *melius inquirendum* to ſupply defectiveneſs or uncertainty in the firſt office, where that office was found by writ or commiſſion to the eſcheator, and where that office was found by the eſcheator *ex officio* without writ or commiſſion; that in the laſt caſe it ſhall be abſolutely quaſhed for the uncertainty; if by commiſſion, a *melius inquirendum* may iſſue to ſupply the uncertainty which perhaps may account for, what is ſaid in *The King and Queen* v. *Manlove*; for there the court were of opinion to quaſh the office for uncertainty, not entering into that diſtinction: perhaps it was not argued fully before them: but according to *Fitzherbert* (who was very learned in theſe kind of caſes) the court would not give that credit to let it ſtand for any part in the one caſe, though it would give credit, as to what was found certainly, by giving credit to the commiſſion. But the principal point for which I cite this book, is under title *melius inquirendum* 573. by which it appears in terms, that ſeveral of theſe inſtances, he mentions, are of *melius inquirendum* iſſuing upon ſurmiſe contrary to the finding of the firſt office; for it ſays, that it may find, they were held by other ſervices; as held in *capite* by *Knight Service*, though found before in common *ſocage*; in conſequence of which the heir would be in ward, though not by the firſt finding; which is contrary in terms to the firſt: and the precedents which have been mentioned, are ſo ſtrong, that ſome of them expreſſly take notice on the face of it, of the contradiction between the two findings. I am of opinion therefore, that this objection upon the contradiction to the firſt finding encounters the authority of *Sloughter's*

caſe (which is fully eſtabliſhed) and alſo other authorities in the books before that caſe.

Upon the third objection it was ſtrongly urged, that this was a contention to gain an advantage greatly to the prejudice of the ſubject; for if this ſecond commiſſion was found for the King, that Mrs. *Dupleſſis* was an alien, that would turn the proof on her. As to that I do not know, that it is of weight, if the fact is true, in the preſent queſtion; becauſe legal proceedings being eſtabliſhed, they muſt be taken, as they are, however the proof turned, as the law is ſettled. But if found for the King, ſhe may traverſe that within the ſtatute; and muſt plead, that ſhe is *indigena*, born in theſe kingdoms, and traverſe, that ſhe is an alien. The King muſt take iſſue upon that, and prove, that ſhe is alien born. It is true, the King has a prerogative in pleading, and has an election in ſome caſes to take iſſue on the traverſe or inducement, that is, may reply maintaining his own title, or may traverſe the title made by the defendant. *Vau.* 62. *The King* v. *Biſhop of Worceſter.* But the exerciſe of that prerogative muſt be, where the traverſe and inducement are both material; and where, if found againſt the party, would make an end of the buſineſs: but in the preſent caſe (ſuch as I have ſtated) the inducement ſets forth no new title in the ſubject, but both the traverſe and plea relate to the ſame queſtion: and if the *Attorney General* was to take a traverſe on the inducement, and that ſhould be found againſt the party, it would not ſhew a clear title in the crown, for the party might be the child of an ambaſſador born abroad, or within the ſtatute of 7 Q. *Anne*, or within the ſtatute born *ultra mare:* ſo that if the crown ſhould take traverſe on ſuch inducement, it would not make an end of it, and therefore it is not material to take iſſue on ſuch inducement, but the crown muſt take iſſue on the traverſe.

Pleading. Where King by prerogative may maintain his title, or traverſe that of defendant.

4 G. 2. cap. 21.

The fourth objection, or rather an authority againſt *Sloughter*'s caſe, was *K. and Q.* v. *Manlove*, *Mich.* 1690. which muſt be allowed to be a caſe of great authority, as far as light can be: but reflects none in the preſent caſe. Lord *Chief Baron* has given it a very proper anſwer. It appears in *Lev.* and in a great meaſure in the other two books, that it turned on another point; that the office had not found what eſtate *Manlove* had in the office of warden of the *Fleet*. That was in nature of a *quo warranto*; and the court held, that the finding was uncertain and void, for want of finding what eſtate he had in the office, whether for years, for life, or in fee. But as to that point, with vaſt deference to the authority of thoſe great men, had it not been for their authority, I ſhould much have doubted of it; for it was a ſtrong preſumption to make, that by poſſibility the crown might have granted out that office in fee, *&c.* when nothing of that kind was found or appeared to the court

at all. The court ſaid, this was to find, whether there had incurred a forfeiture to the King or not; and it was only found, that he was warden of the *Fleet*; he might be warden for life, and other perſons have the inheritance of the office, and the crown not have the reverſion. That, I ſay, is a ſtrong preſumption; for *prima facie* by common intendment of law it is in the King, unleſs ſhewn to be granted out by him: therefore I ſuppoſe, there was ſome reaſon, the court took that caſe in a ſtrong light againſt the proceeding: but however that may be, another anſwer is to be given, which proves it not to be at all applicable to the preſent caſe. I ſhould not obſerve ſo much on this caſe but for this; that if *Sloughter*'s caſe had been encountered by others, or not confirmed by ſubſequent caſes, I ſhould not have laid weight ſo much upon it: but this is the only caſe againſt it. The court there quaſhed the proceeding. It is manifeſt, what was the contention in that caſe on the part of the crown; which was, that the inquiſition ſhould ſtand, as far as it goes; it has found the act of forfeiture fully and clearly; and a *melius inquirendum* goes to ſupply the defect of certainty as to the eſtate in the office; which, the court ſaid, they would not do, as one material part of the finding was uncertain; they would quaſh the whole; they would not enter into the diſtinction in *Fitzherbert* as to the writ of *quæ plura*, but quaſhed the whole; and the conſequence of that was plain, that the crown might have ſued out a new original commiſſion the ſame day; for the firſt, being quaſhed, was entirely out of the caſe. This was indiſputable; for in *Sloughter*'s caſe the court granted a new *melius inquirendum*, not becauſe they can grant a new *melius inquirendum* after a *melius inquirendum*: (for the court reſolved the contrary, that it ſhould ſtop there, and there ſhould not be a ſecond; and the King is on a level with the ſubject in that) but the firſt was gone. This is the common courſe, where a writ abated, whether by plea or other exception, by motion a new writ of the ſame nature may be ſued out. That creates no prejudice to the right of the party. This is an anſwer to the arguments drawn from other proceedings, as in real actions, that a new writ of the ſame nature ſhould not be in that caſe one after another; and there ſhall not: but if the party ſues out a writ of *novel diſſeiſin*, and that abates, he has a new writ of *novel diſſeiſin*, becauſe the firſt abates. In that caſe of *Manlove* the firſt writ abated, and therefore there might be a new one. All, that can be ſenſibly collected from the rough account of that caſe in the books, is a contention, that the crown might avail itſelf of the forfeiture.

Writs. In real actions no new writ of the ſame nature: unleſs where abatement.

I am of opinion therefore, that both the points are ſettled by authorities and precedents. Firſt I concur, that there ought not to be a new original commiſſion after a former found againſt the King is ſtanding in force. If it had been quaſhed, it might be another matter. I am of opinion alſo, there may be a *melius inquirendum* upon

upon a ſuggeſtion though contrary to the firſt finding: but that this commiſſion, appearing to be a new original commiſſion, ſhould be ſuperſeded. As to the latter part of this, it muſt be left to the conſideration of the King's counſel, how far it is proper to pray a *melius inquirendum* or not.

Lord *Chief Baron.*

In *Kelway* 199. the very ſame diſtinction is taken, as is taken by *Fitzherbert.*

Attorney General *verſus* Bowles, *July* 24, 1754. Caſe 185.

Charity. Legacy to be laid out in land or ſome real ſecurity for a ſchool-maſter: void within ſtat. of Mortmain.

WILLIAM Bowles by his will 3*d of May* 1745. gives and bequeaths to truſtees 500 *l.* to be raiſed by and out of the perſonal eſtate upon truſt to lay out part thereof in erecting a ſmall ſchool-houſe, and a little houſe adjoining for the maſter to live in; the whole purchaſe and building not to exceed 200 *l.* the remaining 300 *l.* to be laid out in the purchaſe of land or in ſome real ſecurity for the maintenance of the maſter.

It was urged, that *real ſecurity* meant ſubſtantial, good, and effectual ſecurity; and therefore that it was not within the *ſtat. of Mortmain*, 9 G. 2.

Lord Chancellor held otherwiſe, and that he muſt take the word *real* in the known, legal, ſignification of it, and could not annex a new idea to it; therefore the 300 *l.* legacy was void within that ſtatute. But as to the 200 *l.* if they could get a piece of ground by the gift or generoſity of any perſon, not by purchaſe, they might be at liberty to apply to the court to lay out that 200 *l.* in erecting a ſchool-houſe thereon, when the truſtees can lay a propoſal before the court: but not to be laid out in land to build upon: and this propoſal muſt be in a certain time.

Hylton *verſus* Hylton, *July* 25, 1754. Caſe 186.

Annuity to guardian or truſtee ſoon after coming of age ſet aſide upon general principles of publick utility; and alſo on particular circumſtances of impoſition.

THE plaintiff had conſiderable gifts or proviſions left to him by the will of *Philippa Downes* his aunt, and *Charles Palmer* his half brother. The defendant his uncle, was acting executor and truſtee in both thoſe wills, and alſo acted as guardian to him during his minority, having neither father or mother. Coming of age in *April* 1746, he in *October* 1747. entered into a tranſaction with his uncle, whereby the plaintiff granted to him an annuity of 60 *l.* gave him a general releaſe and two written diſcharges, all ſigned the

the ſame date with the grant, upon his delivering up ſeveral papers.

Not ſo, if done with eyes open, after put into poſſeſſion and at liberty; as are ward.

The bill was to ſet aſide this grant of annuity upon the general principles of being made juſt after coming of age, without being thoroughly informed; and that it is not neceſſary to prove impoſition, for theſe voluntary grants have not been allowed in ſeveral inſtances; and are to be compared to a gift to an attorney pending the ſuit; ſo of marriage brocage-bonds. In *Pierſe* v. *Waring*, 13 *Nov.* 1745. Mr. *Hall* coming of age made a preſent to his guardian of 3500*l.* ſtock; *Your Lordſhip* held, it ought to be ſet aſide on the general principles from the dangerous conſequences, if a guardian is allowed to take preſents, before he delivered over every thing; for that it was an honorary truſt, for which the law would allow them nothing; as that would induce guardians to flatter the paſſions of their pupils; and it was ſet aſide for being retained by him on pretence of trouble during his minority, in the management of the truſt; and that caſe is not ſo ſtrong as the preſent.

For defendant it was ſaid, there were particular circumſtances diſtinguiſhing this from the common caſe; that all was fair, and the defendant delivered up all the eſtate under both wills, and what more would the plaintiff have? That it proceeded freely and voluntarily from the bounty of the plaintiff, and for ſervices done, and to relieve the diſtreſs of his uncle and guardian; and that there appears a letter from plaintiff to defendant uſing many kind and favourable expreſſions, and ſhewing that he thought, the defendant had acted fairly.

LORD CHANCELLOR.

The queſtion is, whether the plaintiff is in this court intitled to be relieved totally againſt this grant, or whether it is to ſtand for the whole or any part. The grounds for relief are firſt the general grounds and principles allowed in this court: next particular grounds from circumſtances in this caſe.

The general grounds to be relieved againſt this annuity are certainly of ſuch a kind, as the court has allowed in other inſtances, provided the circumſtances of this caſe came up to the rule laid down therein. Where a man acts as guardian, or truſtee in nature of a guardian, for an infant, the court is extremely watchful to prevent that perſon's taking any advantage immediately upon his ward or *ceſtuy que truſt* coming of age, and at the time of ſettling account or delivering up the truſt; becauſe an undue advantage may be taken. It would give an opportunity either

either by flattery or force, by good uſage unfairly meant or by bad uſage impoſed, to take ſuch advantage; and therefore the principle of the court is of the ſame nature with relief in this court on the head of publick utility, as in bonds obtained from young heirs, and rewards given to an attorney pending a cauſe, and marriage brocage-bonds. All depend on publick utility; and therefore the court will not ſuffer it, though perhaps in a partiular inſtance there may not be actual unfairneſs. Upon that ground I went in the caſe cited; in which I have added at the end of my note taken at the hearing of the cauſe, "*to be abſolutely ſet aſide, being between a guardian and his ward "juſt come of age, and on reaſon of publick utility.*" How does this caſe ſtand? The defendant appears to ſtand in the place, not of a common truſtee barely of a particular eſtate, but of a truſtee acting in fact as guardian for the minor his nephew, and taking care of his perſon and his eſtate; ſo that the condition of theſe perſons, the plaintiff and defendant, comes within this rule. Next conſidering the nature of the tranſaction, which was when the plaintiff was about twenty-two, the reſult is, (and this brings it within *Pierſe* v. *Waring*), that at the very time this uncle, who was truſtee and acted as guardian, pretended to come to an account and deliver up the eſtate the plaintiff was intitled to, he took a voluntary beneficial grant of an annuity from this ward of his. That is the very time, at which there is the beſt opportunity to take the advantage of getting ſuch a bounty as this; for at that very time the eſtate is to be accounted for and delivered up. The thing ſpeaks itſelf. "*I will not deliver up the eſtate you are "intitled to, and account, unleſs you grant me this.*" Beſide, it appears to be a previous deſign of the defendant, and that he ſtipulated and haggled for that annuity at that very time, when a truſtee ſhould avoid it. The rule of the court as to guardians is extremely ſtrict, and in ſome caſes does infer ſome hardſhip; as where there has been a great deal of trouble, and he has acted fairly and honeſtly, that yet he ſhall have no allowance: but the court has eſtabliſhed that on great utility, and on neceſſity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the ſame circumſtances. Undoubtedly, if after the ward or *ceſtuy que truſt* comes of age, and after actually put into poſſeſſion of the eſtate, he thinks fit, when *ſui juris* and at liberty, to grant that or any other reaſonable grant by way of reward for care and trouble, when done with eyes open, the court could never ſet that aſide: but the court guards againſt doing it at the very time of accounting and delivering up the eſtate, as the terms: for the court will not ſuffer them to make that the terms of doing their duty. This caſe therefore is within thoſe general principles.

Bonds by young heirs, or to attorney pending ſuit, or on marriage-brocage, ſet aſide on publick utility.

Next as to the particular circumſtances relied on to diſtinguiſh this out of the general rule, I am of opinion, they all bear againſt that, and tend to ſhew actual impoſition on the part of the defendant. It does not appear, that the nephew was in circumſtances to grant this clear annuity, any more than the uncle was to provide for himſelf; as to whoſe ability there is nothing in proof, except what ariſes from the plaintiff's letter. The circumſtances plainly ſhew, the defendant would not part with the eſtate, until he was ſure of this grant: then here is a ground to go not only on the general principles, but to ſhew that the defendant did actually make uſe of that influence. The plaintiff's letter and his kind expreſſion therein ſhew, he was impoſed upon, thinking every thing was ſurrendered up, whereas the legal eſtate is ſtill in the defendant: nor is there any evidence of an account made up of the perſonal eſtate proved to have come to defendant's hands. Certainly, if any thing could make ſuch a tranſaction ſupportable, it muſt be, where there was a real and fair account; of which there is no evidence: yet a general releaſe is given upon delivering up ſeveral papers and vouchers, as they are called.

Therefore on the general rule, and nature of this particular caſe, and the deluſion and deception under which the plaintiff was, this grant ought to be ſet aſide with coſts; and a conveyance, and an account, if plaintiff prays it.

Caſe 187. Hawkins *verſus* Penfold, *July* 25, 1754.

Bankrupts. Creditors receiving money or bills after act of bankruptcy committed; a good payment, if no notice.

THE plaintiff and defendant were ſureties in a bond for a woman, whom afterward the plaintiff marries. The plaintiff's wife pays the money due on the bond to the defendant the other ſurety, in order to pay off and diſcharge that bond. The defendant inſtead of doing that applies the money to his own uſe. An action is brought by the obligee againſt the plaintiff and his wife; the money is recovered; and the plaintiff pays it off. After this, and after an act of bankruptcy by the defendant; there is a further tranſaction between them; and the defendant puts into the hands of, and indorſes to, the plaintiff two bills of exchange; upon which the money is received by the plaintiff.

The queſtion was, whether the plaintiff muſt come under the commiſſion; ſo that the bills of exchange coming to his hands ſhould make no alteration?

LORD

LORD CHANCELLOR.

If the creditor has no notice of the act of bankruptcy, I think it will make an alteration. It is ſome hardſhip in reſpect of a creditor of a bankrupt, when he receives the money. After recovery in the action by the obligee the defendant was diſcharged in reſpect of the obligee, and undoubtedly became debtor to the plaintiff for ſo much had and received to plaintiff's uſe. I take the putting the bills of exchange into the plaintiff's hands to be done in order to make ſatisfaction for the money on the bond. If this money was received by the plaintiff from the defendant before ſuch time as the plaintiff had notice of the act of bankruptcy committed, it was a good payment; for there is an expreſs *proviſo* in the act of parliament, which indemnifies creditors in receiving money for their debts, though after an act of bankruptcy, if no notice; and there is no difference between an actual payment of money in ſatisfaction of a debt and indorſing bills of exchange: provided the money was received on them before the commiſſion of bankruptcy iſſued: for I ſhould take that as only a *medium* of payment, and no more: and otherwiſe it would be very hard. But if the plaintiff had notice of the act of bankruptcy at the time, there would be no ground to ſet off; for the act of parliament ſays, "where mutual debts are con- 5 G. 2.
"tracted before the act of bankruptcy is committed." If therefore notice was given, it would be a *tortious* receipt. It depends then on this fact; and the conſequence is, I muſt either direct an iſſue to try it, or give liberty to reply to the anſwer, in order that they may prove notice.

Attorney General *verſus* Governors of Harrow School, Caſe 188.

July 26, 1754.

Charity. Where truſtees of charity have a diſcretion to lay out on a road, the court will not interpoſe, unleſs they act corruptly: yet will not diſmiſs the information.

JOHN LYON in the reign of Queen *Elizabeth* gave certain lands to truſtees, governors of *Harrow School*, that they ſhould employ all the profits yearly towards repairing and amending the common highway from *Edgware* to *London*, when, and as often, and in ſuch manner, as the governors ſhould think fit; and if hereafter it ſhould happen, that the ſaid highway ſhould be ſufficiently amended, or not to require the whole profits to be laid out, as often as that ſhould happen, the governors ſhould lay out on the road from *Harrow* to *London* the whole, or ſo much as ſhould remain after repairing the *Edgware* road.

The information was grounded on the expending thoſe profits on the *Harrow*, which ſhould have been all laid out on the *Edgware*, road.

For defendants, an objection was made to the juriſdiction of the court, which proceeds only in caſes, where a charitable commiſſion could iſſue; which could not in this caſe from the *proviſo* in the ſtat. 43 *Eliz.* and that in a foundation of this kind, where no ſpecial viſitor is appointed, the viſitatorial power reſulted to the heir of the founder. 2 *Wil.* 325.

Sec 1. 3. 43 Eliz. ch. 4.

Where there is a viſitor, no commiſſion within 43 Eliz. Otherwiſe of a collateral charity.

Lord Chancellor allowed, that theſe perſons by being made governors were not viſitors; but as to the point of juriſdiction, the court had already taken it to be otherwiſe than was inſiſted upon, and had interpoſed; as appeared by a decree by Lord *Elleſmere* in 1611. The conſtruction of that clauſe in 43 *Eliz.* is, that where a college, hoſpital, or ſchool is founded, a ſpecial viſitor appointed, or a viſitor by operation of law, the commiſſion by virtue of that ſtatute ſhould not interpoſe. If therefore this information was for the revenue of the ſchool, that objection might ariſe: but this is a diſtinct charity from the ſchool, a collateral truſt, and upon that diſtinction the above decree has proceeded. Yet I do not ſee, what decree I can make upon this information; and, I think, the founder intended to leave it in a good meaſure to the diſcretion of the governors of the ſchool; though not abſolutely, if they acted partially and corruptly. The *Edgware* road appears to have the aſſiſtance of two turnpike acts, which the *Harrow* road has not, and appears by the evidence to be in very bad repair. Suppoſe the *Edgware* road had or could have been put into the like condition or repair, it is now in, by the pariſh-rates, and the *Harrow* road proved to have been in the like condition, it is in now; it could not be ſaid, the truſtees had done wrong in applying the revenues in repair of the *Harrow* road. The queſtion is, whether the truſtees have not done rightly, in thinking the *Edgware* road is ſo good as not to want the aſſiſtance of this charity, and that the other did? At preſent I do not ſee, how I can interpoſe; and if I ſhould, it would be in contradiction to the intent of the donor; which was to leave it in the ſound diſcretion of theſe judges; and where they act fairly, and not corruptly or partially, a court of juſtice would do too much to controul their acts. Beſide it would end in a trial between the pariſhes which road wanted it moſt: but though I will make no decree at preſent, yet I will not diſmiſs the information, but ſtill keep a hand over them.

Caſe 189. Stace *verſus* Mabbot, *July* 26, 1754.

Trial.

A Motion was made for a new trial: the queſtion was as to the forgery of a certain paper, relative to the eſtate of Captain *Girlington*.

Againſt it it was ſaid, *Juſtice Foſter*, who tried the iſſues, had certified, that he was ſatisfied with the verdict; and two caſes were cited. The firſt an action of *Trover* brought among ſeveral other things for an ewer; wherein evidence was given, that thoſe particular goods were delivered to one, who took them into his cuſtody, was anſwerable for, and did not deliver them. A motion was made for a new trial; for that upon looking into Mr. *Deard*'s books it was found, there were two Ewers: whereas upon the material evidence, on which the converſion was found, it was one ewer only: but that was denied, for the court ſaid, the parties might have introduced this evidence before. The other *Walker* v. *Scot*, *B. R. Hil.* 1749-50; which was an action for criminal converſation, and a motion for a new trial on evidence, that the plaintiff was married to another; and therefore was not huſband to the woman, and could not maintain his action; and that the evidence given was infamous: but this was denied, becauſe it would be dangerous, if the court was to permit the credit of evidence to be impeached by ſubſequent evidence, which was in the party's power before: and the fact of marriage might have been gone into before.

New trial upon new evidence, where the conſcience of the court was not ſatisfied, although the judge certified in favour of the verdict, and where it would not be granted in court of law, which is ſtricter, and will not grant it to introduce new, or anſwers to evidence.

LORD CHANCELLOR.

If this had been an application for a new trial in a court of common law, in the ordinary courſe of proceedings there; I believe it is not ſuch a caſe, that it would be granted; for they hold theſe motions for new trials by pretty ſtrict rules. They have been a modern introduction; and by the diſcretion of the courts introduced in order to avoid the difficulties of defeating verdicts by attaint, in which it was difficult to prevail. But however, on motions for new trials at law the rule is, that if a verdict is given on evidence fairly according to proper notice, and the judge does not report, that he is diſſatisfied with it, or that it was againſt evidence; the court will not grant it in order to introduce new evidence or new anſwers to evidence; for the parties are ſuppoſed to come prepared to ſupport the characters of the witneſſes on either ſide; which is always preſumed, and is right for courts of law to adhere to that: otherwiſe it would be endleſs. But this court directs iſſues to be tried at law to inform the conſcience of the court as to facts doubtful before; and therefore expects in return ſuch a verdict and on ſuch a caſe, as ſhall ſatisfy the conſcience of the court to found a decree upon; if therefore upon any material and weighty reaſon the verdict is not ſuch as to ſatisfy the court to found a decree upon, there are ſeveral caſes, in which this court has directed a new trial for further ſatisfaction, notwithſtanding it would not be granted, if in a

New trials of modern introduction, and to avoid difficulties in attaint.

Granted here in caſe of inheritance or of value, or where the court was not ſatisfied, particularly on forgery.

court of common law; becauſe it is *diverſo intuitu*, and becauſe the court proceeds on different grounds. This is known to be the ordinary rule of this court, where a matter of inheritance is in queſtion; for the court ſays, an inheritance is not to be bound by one verdict, if any ſort of objection ariſes to the trial; and that notwithſtanding the objection of inconvenience in examining over and over, which objection has not prevailed. This extends alſo to a perſonal demand, where of conſiderable value, and where the court is not ſatisfied with the grounds, on which the determination was made at law, and when an objection is made and ſupported by proof; and particularly in a caſe of forgery new trials have been granted, and that by judges who have ſat here, who have been as reluctant as any, and who inclined to adhere to the rules of common law. I remember a caſe in Lord *King*'s time relating to a rent charge, granted out of the eſtate of Mr. *Hockmore* in *Devonſhire*. It had been twice or thrice tried at common law, tried upon diſtreſs taken on the rent charge, and an avowry, and where the queſtion was ſingly whether it was a forgery or not, and upon all thoſe trials verdict was found for the deed. A bill was notwithſtanding brought here to ſet it aſide for forgery; and Lord *King* ſent it to trial under an iſſue directed by the court; and, I believe, there was a new trial after that: and notwithſtanding all thoſe verdicts Lord *King* made a decree to have it brought into court and cancelled here, the former trials not being to the ſatisfaction of the court. Undoubtedly therefore it is in the diſcretion of the court to grant new trials, if they think fit, if there is a ground for it upon the circumſtances here; and the queſtion is, whether there is ſo or not? I own, I had very great ſuſpicion, when it was on before me upon exceptions: however I did not think fit to determine it, but ſent it to a jury. The judge has declared, he is well ſatisfied with the verdict; and if nothing appeared to me, but what appeared to him thereon, I think, I ſhould have been of the ſame opinion with him. My opinion therefore in granting a new trial is grounded upon new evidence, which was not before the jury there, and which is material. I cannot ſay, that my conſcience is ſatisfied as to the grounds and truth of the evidence, upon which this verdict is given. I proceed therefore upon the principles of this court in directing trials, and not to break in upon the rules which are wiſely laid down by courts of law as to granting new trials; and ſhall therefore direct another trial upon theſe iſſues: but it muſt be on payment of coſts.

Knight

Knight *verſus* Dupleſſis, *July* 27, 1754. Caſe 189.

A Motion was now made on the part of the crown for a *melius inquirendum* into *Middleſex* upon this ſurmiſe, that ſince the execution of the former commiſſion finding Mrs. *Dupleſſis* not to be an alien there had been material evidence on the part of the crown from *Switzerland*, the country in which ſhe was ſaid to be born; and a finding on a commiſſion into *Norfolk* that ſhe was an alien. That as to precedents in the court of *Wards* they lye in ſuch confuſion, nothing could be collected from them: that on ſearch of commiſſions by the great ſeal but one could be found, in 1697 moved *ex parte Regis*, where it iſſued on a ſurmiſe barely without affidavit of facts: whereas this is founded on affidavits; but according to that inſtance there is no need to read them. That indeed was not ſtrictly a *melius inquirendum*; it was to inquire into abuſes by the *Warden* of the *Fleet*; and therefore a new commiſſion was prayed, and ordered accordingly. This is the only inſtance, where it has been iſſued by order of the court.

Ante. July 22. *Melius inquirendum* for the King on a proper ſurmiſe, pregnant matter.

LORD CHANCELLOR.

This precedent is nothing like a *melius inquirendum*, but is a ſurmiſe for an original commiſſion; therefore it is quite a new commiſſion, and I do not know, but it might have iſſued by *fiat* of the *Attorney General*. You muſt lay evidence before the court for your ſurmiſe; therefore read the affidavits.

This matter was fully conſidered upon the former queſtion, whether the commiſſion was regular; which was held not to be ſo by the *Lord Chief Baron* and by me, but that a *melius inquirendum* might go; and the finding in the county of *Norfolk* contradictory to the other, is proper to lay before the court to ſupport a ſurmiſe for a *melius inquirendum*; which brings it within the ground of *Sloughter's* caſe, 8 *Co.* 168. determined by great men, and that upon grounds of equity as well as law. The rule as to *melius inquirendum* is this, that in ſound diſcretion the court ſhould not award it unleſs on ſome matter of record, or ſome other pregnant matter to ſhew the former to be miſtaken: and *Lord Chief Baron* and I were of opinion, that the finding on the commiſſion in *Norfolk* was a pregnant matter to be laid before the court for further inquiry. What the *Lord Chief Baron* meant by a pregnant matter for the King, was matter pregnant with evidence of the King's right; and this is ſuch; and here is further corroborating

8 Co. 169. A.

roborating evidence laid before the court by witneſſes. Therefore let the *melius inquirendum* iſſue in this caſe for the King.

in March 1744. Case 190.
Peerage of Gage & Buckley in Sess. Papers
in
† But v. N. 39. Here is the case of Gage & Buckley relative to the same transact.
in the case there were 2 pleas
1. Was of the same cause of action, in support of which were cited Barrow & Gemino, now rep. in 2. Str. 733. Buckley's case in Show. & Raym. & 1. Vern. 21 & 41.
2. The statute of limitat.

Foreign courts.

Commiſſion to examine at *Paris* as to extent of juriſdiction of a court erected there, and the nature and effect of the ſentence and proceedings: but not as to the original conſtitution of it.

Allegat.ns ag.t y.e sentence of y.e comm.r of arr.t
1. The king's arret for erecting y.t court not registered.
2. Being judgm.t by default not final.

Gage *verſus* Lady Stafford, *July* 27, 1754.

vol. 1. p. 214. This case not in Ch. Parks collect.n of miscellan. notes. See Vol. 2. p. 4

A Motion was made for a commiſſion to iſſue into *France* to prove ſome matters at *Paris*.

The bill was againſt the repreſentatives of Mr. *Cantillon*, late banker at *Paris*, for payment of what was due from him and his partner *Hughes* for money depoſited by the plaintiff with them; for which they accounted with the plaintiff at a decreaſed value, the *actions* having in the mean time fallen.

A plea was put in of a ſentence in a court of final juriſdiction (as it was ſaid for defendants) erected at *Paris* to determine the caſes of *actions*, which regarded the *Miſſiſipi*, where the queſtion was litigated between *Gage* and the repreſentatives of *Cantillon*, and determined againſt *Gage*.

His Lordſhip held it not proper as a plea, but let it ſtand for an anſwer, and reſerved the benefit of it until the hearing.

The facts now deſired to be examined to were as to the matters in the plea, it being alleged for the plaintiff that the *arret* of the *French* King was never regiſtered by the parliament of *Paris*, and that ſuch regiſtry was neceſſary to give a juriſdiction to that court. Next that it was a judgment by default, and that ſuch judgment there is never final. Next that the ſubject matter was not proper for that court. An affidavit was read to ſhew, that it was neceſſary for the plaintiff to have this commiſſion. The defendants in their anſwer rely on the ſentence of the court of *Actions* in *Paris*, which makes it neceſſary for the plaintiff to inquire into the authority of that court, to ſhew it was not properly conſtituted; for though a judgment in a foreign court will not make judgment-debt in *England*, yet where between proper parties, it may have weight at the hearing. Where there is a ſentence of a municipal court in a foreign country, it is proper to inquire into its juriſdiction; for it may be limited, circumſcribed as to locality or matter; and then no faith is given to it in another country but upon ſeeing, that it proceeded on matters within its juriſdiction, and the cauſe proper for its determination. A judgment by a municipal court abroad is not regarded in a cauſe depending here, which is to receive the judgment of a court here; and in our courts of common law it has been refuſed; lately at

X Lord Hardwicke, as to the first point, held the sentence not to be pleadable in bar either at law or equity, but that being by a foreign jurisdiction it could only be used as evidence of the right. He observed, that the validity of the sentence, if pleaded, depended on many circumstances, which must be made out by proof. He avoided any opinion on y.e merit of y.e cause, & y.e sentence, that y.t court was of doubtful jurisdiction, & that he did make a difference on that account. He also declared an opinion on y.e objection, y.t treaties & deposits were within y.e jurisdiction. He said y.t objection of their not being y.e genuine judges required by the arrets was a strong one. — On the 2.d plea

Guildhall

Guildhall in *Trover* for a large quantity of hemp at *Riga* to the amount of 2,000 *l.* the action was brought to try the property here; and the queſtion was, whether it was conſigned ſo as to give a property to the merchant abroad, who failed, or whether only ſent to him as a factor who had the cuſtody of it: the judgment abroad was refuſed by *Lee* C. J. who ſaid, he could not take notice of a determination of a court abroad as to a matter, which came to be tried here.

For defendants, it was ſaid, this extraordinary examination, as to points which would be very difficult to determine, would not be objected to, provided the plaintiff gave ſecurity to anſwer the coſts, beyond the ordinary rule where the party lives abroad; and alſo conſented, that the depoſitions and exhibits on both ſides in a cauſe, wherein Lord *Montgomery* was plaintiff, may be admitted at the hearing; and to examine to this only.

LORD CHANCELLOR.

It is an old rule eſtabliſhed, that it ſhould be 40 *l.* to anſwer coſts of ſuit; but that is now very low; and the court has often taken notice of the lowneſs of it. That was ſettled at a time, when the coſts of this court did not run to any thing, like what they do now. There are few cauſes now, where that is near the amount of the coſts. I have directed an inquiry; and no inſtance is found, that the court increaſed it by their authority: though it has been done upon terms. It is doubtful, whether the court ſhould make ſome rule, or leave it to diſcretion; I believe it ſhould be diſcretionary: although that will burthen the court with motions, where the parties live beyond ſea. If therefore you will take it upon thoſe terms, that upon the plaintiff's giving ſecurity to anſwer 300 *l.* (which is propoſed by the plaintiff) and upon the other terms, the commiſſion ſhall iſſue.

Coſts.

Where the party lives abroad, 40 *l.* to anſwer coſts is the old rule; which, though now low, is not increaſed by the court, unleſs on terms.

The propoſals were agreed to on both ſides.

LORD CHANCELLOR.

Then I will give you ſome warning upon this examination. As to the firſt point, that this court or commiſſion was not regiſtered, and that it was thought neceſſary at that time, I will not enter into the determination of that queſtion in an *Engliſh* court of *Chancery*; I will not determine here what is the prerogative of the *Moſt Chriſtian King* as to granting commiſſions. I will tell you beforehand, what would be my opinion. Where a juriſdiction has been erected by the ſovereign of a country, which has been *de facto*

the Lord Ch. don't appear to have given any opinion, the note only mentioning that 2 Ld. Ca. 220. was cited for plt.

facto executed and ſubmitted to in general by the ſubjects in that country, I ſhall take that to be a lawful court of that country; for otherwiſe this court would be to determine the original conſtitution of the ſeveral nations in *Europe*, and how far the power of the ſovereign is abſolute; which would be infinite. If therefore you enter into a general examination concerning that point, I will make you pay coſts as to that. If indeed you examine as to the extent of that juriſdiction, that is proper for you to ſhew; and alſo to ſhew the nature and effect of the ſentences and proceedings in the ſaid court: but not as to the firſt queſtion, of which I will not take upon me to judge: and, I think, it would defeat the intent of the commiſſion, if it was known there, that it iſſued to inquire into that. By conſent of parties therefore as aforeſaid, let the commiſſion iſſue to be executed at *Paris*.

Caſe 191. Hare *verſus* Roſe, *July* 27, 1754.

AN account is taken and an eſtate ſold in purſuance of a decree in 1730, by which coſts of ſuit were given to all parties generally out of the eſtate.

An order had been obtained laſt term for payment of coſts to the plaintiffs and defendants before the report was made final.

A motion was now made to ſet aſide that order for irregularity, and want of notice to the creditors before the Maſter.

LORD CHANCELLOR.

The courſe of the court is, that when a bill is filed by parties intereſted in the ſurplus of an eſtate againſt proper parties to have the account taken, ſome of which are creditors, and a decree is made, and liberty to all other creditors to come in; in any proceeding in the cauſe between the plaintiffs and defendants (unleſs ſuch as affect the particular creditors coming in before the Maſter, and concern their rights and demands) there is no occaſion to give notice to ſuch creditors; for then the particular ſolicitor of every creditor muſt have notice.

The court now does not often give coſts generally, though it was frequently done formerly. Sir *Joſ. Jekyl* did it upon the foundation, that it would be expenſive to come again. Coſts are given in this caſe, they are firſt to be paid before the debts; for coſts of ſuit are always firſt to be drawn out, when given in this manner. Upon an application to have their coſts taxed the court has made an order for that purpoſe on conſent of the defendants, who had a right to conſent; and they certainly had as againſt creditors,

creditors, who come under the decree; and it was the ſame to thoſe creditors, whether they had it ſooner or later. In a ſuit by a mortgagee or one particular creditor againſt perſons intitled to the ſurplus of the eſtate, and all other creditors to come before the Maſter, it often happens, that after a decree, if it be a deficient fund, and the plaintiffs and defendants are out of the ſuit, it is a common caſe for the creditors, who come in, to apply to the court to proſecute the ſuit in name of the plaintiffs for their own benefit; for the plaintiffs are not compellable to carry it on. Then conſequently when theſe coſts are taxed, the plaintiffs may be out of the caſe; and then it may be right for theſe creditors to apply. They muſt have their coſts out of the eſtate, before any of theſe creditors are intitled to their demands.

Hawkins *verſus* Obeen, *July* 27, 1754. Caſe 192.

THE firſt limitation by a will was a charge of all debts and legacies upon an eſtate; the next to *Obeen* and his heirs on truſt to the ſeveral uſes and truſts afterward declared; to the uſe of the plaintiff for life without impeachment, &c. remainder to *Obeen* and his heirs to ſupport contingent remainders; and ſo to others for life, remainder in like manner to *Obeen*.

Infant truſtee bound to join in conveyance within ſtat. 7. Q. *Anne*.

Not where infant has an intereſt, or doubt thereof, unleſs on proper ſuit.

A decree was made for ſale of the eſtate, and that *Obeen* ſhould join in the conveyance; who dies after the decree, leaving an infant ſon and heir.

Upon motion the queſtion (ſaid to be a new queſtion) now was, whether that infant, ſhould join in the conveyance under the ſtat. 7 Q. *Anne* made to enable infants truſtees to convey?

LORD CHANCELLOR.

I have no doubt at preſent, but that he is an infant truſtee within that act of parliament. To be ſure in any caſe where an infant has an intereſt in an eſtate, or there is a doubt, whether he has an intereſt in it of his own or not, it is determined not to be within it; and the court will not determine it by ſuch an interlocutory method to be within the act of parliament; but it muſt be by proper ſuit, where the rights of the infants themſelves are in queſtion: but here is no pretence that the infant has any kind of intereſt beneficially for himſelf. This may be poſſibly an uſe executed: but it is impoſſible to raiſe the charge on the eſtate but out of the fee of the eſtate itſelf. If there is ſuch a charge for the debts, ſo far he is certainly a truſtee. But ſuppoſe this is a deviſe of the legal eſtate, and veſts the whole legal eſtate ſubject to the debts in

in the ſeveral deviſees, then the conveyance muſt be from the ſeveral perſons, in whom that legal eſtate veſted. Then the only doubt is the truſt for contingent remainders. But if the firſt charge is for payment of debts, it is abſolutely neceſſary for him to join to deſtroy the contingent remainders as to ſo much for the debts. He is but a truſtee therein, and muſt join ſo far. Taking this as a deviſe of the legal eſtate; and ſuppoſe a ſon had been born of the plaintiff, and had attained twenty-one, that ſon would be decreed to join in this conveyance to raiſe money for payment of debts and legacies; this infant is nothing but a truſtee for him; and muſt join therein. Here is no doubt as to any beneficial intereſt in the infant; and if there had been ſuch doubt it would not be material; for here a decree has been; if therefore there had been once a queſtion concerning the beneficial intereſt, and a decree binding his anceſtor, that would bind the infant.

Caſe 193. Sleech *verſus* Thorington, *July* 29, 1754.

At the Rolls.

SEVERAL queſtions aroſe upon a will, the firſt on theſe words: "I give the remaining 500*l.* *Eaſt-India* ſtock "to all the other children of the ſaid *George Randal*, which he "now has or hereafter ſhall have by his preſent wife, equally "ſhare and ſhare alike, and to be applied by their father to put "them out to proper trades in order to get their livelihood."

The next was upon the words; "*Item*, I give to my couſin "*Anne Becket* 700*l.* *South Sea* annuities: but if ſhe happens to "marry again, I give and bequeath the ſame to the ſaid *George* "*Randal*." It was ſaid for her, that the teſtatrix proceeded on a ſuppoſition, that *Anne Becket* at the time of making the will was a widow; that ſhe was in fact married unhappily; her huſband had embezzled part of her fortune, and gone abroad at the time of putting in her anſwer, and ſhe had no maintenance from him; and therefore her property under the will ſhould be paid to her ſeparate uſe without the intermeddling of her huſband.

The next on this bequeſt; "*Item*, I give and bequeath unto "the ſaid *George Randal* 400*l.* *Eaſt-India* bonds on truſt to pay "the intereſt thereof from time to time to my niece *R. H.* until "her age of twenty-one or marriage, and afterward to pay the "ſaid 400*l.* *Eaſt-India* bonds to her." The teſtatrix recites this bequeſt in her codicil; and alſo recites another bequeſt in her will

will of three *Exchequer* orders, which ſhe had ſince ſubſcribed into the bank of *England*, and ſubſtitutes in the place of thoſe orders a pecuniary legacy. At the death of the teſtatrix only one *Eaſt-India* bond was found in her poſſeſſion. The queſtion was, whether this was to be conſidered as a legacy merely of quantity, ſo as to amount to a direction to the executor to lay out ſo much of the reſidue of the perſonal eſtate, as would purchaſe it; or whether to be conſidered (as contended for the charities, to which the reſidue was given) as a ſpecifick thing exiſting, and the property of teſtatrix at the time of her making the will, though not found in her poſſeſſion at her death, and therefore as a ſpecifick legacy of which there was an ademption.

The next concerning 2413*l.* 13*s.* given by the will to ſeveral perſons in ſeveral parcels and different proportions by the name of *South-Sea* annuity ſtock or *South-Sea* annuities, giving to her coachman the remaining 13*l.* 13*s.* *South-Sea* ſtock ſtanding in her name. It was admitted, that the *South-Sea* annuities, of which ſhe was poſſeſſed at her death, amounted to no more than 2157*l.* 12*s.* 1*d.* the queſtion was, whether the deficiency ſhould be made good out of the reſidue.

The next upon this part of the will; "*Item*, I give and be-"queath unto the two ſervants, that ſhall live with me at the "time of my death 100*l.* new *South-Sea* ſtock to be equally di-"vided between them." In fact the teſtatrix had but two at the time of making the will; and afterward took another, who lived with her to the time of her death.

Sir *Thomas Clarke*.

If there was a neceſſity for an immediate determination upon the firſt queſtion, it would be attended with ſome difficulty; for the firſt words import a preſent veſting immediately on teſtatrix, becauſe otherwiſe there could not be an equal diſtribution; *George Randal* could not know, how many children he might have: the ſubſequent words refer to future events and contingencies, and contradict the deſign of a preſent veſting. But the ſame children exiſt at the making the will and death of teſtatrix; and it will be time enough to determine upon the meaning, when any of the contingencies require an application to the court. In the mean time let the 500*l.* ſtock be transferred by the executors ſubject to the truſt and purpoſes of the will.

As to the 700*l.* if a proper caſe was laid to warrant what is inſiſted upon, the court would without difficulty take care of the wife's property from coming into the huſband's hands; to which Baron and feme.

Husband, suing for wife's property, must make a settlement.

The interest to wife, if left unprovided: otherwise if he maintain her.

purpose several cases have been. In general where a husband comes into court for the wife's property, or any thing he claims in her right *jure mariti*, he is obliged to submit to the terms of the court, and make a settlement or reasonable provision out of that. Various instances have been, where the wife has insisted, husband should have nothing; the court has not thought itself impowered to take from the husband the wife's fortune, so long as he is willing to live with her and to maintain her, and no reason for their living apart; even where the husband will not come in before the Master, the court will not go so far as to do any thing in diminution of the husband's right, so as to take away the produce from him, or prevent his receiving the interest; but constantly where he maintains the wife, accompanies the direction for a suspension with payment of the interest to the husband: it is otherwise where he leaves her unprovided; *Colmer* v. *Colmer* by Lord *King*. But more particularly in *Watkyns* v. *Watkyns*, *Dec.* 10, 1740, where exactly like this case the husband was gone abroad, and left his wife unprovided for, the court laid hands on the money, which was in the power of the court, and directed payment of the interest to the wife, until the husband returned and maintained her as he ought. Here no one appears for the husband. The wife is a defendant; and her answer is not replied to; so no proof can be of that fact of the husband's being abroad to warrant the court to give such immediate direction. All I shall do therefore, will be to direct the Master to inquire, whether she has been deserted by her husband without a maintenance, and whether he has made any and what settlement or provision for her; and in mean time until such report made it will be under the power of the court, and shall be transferred subject to further order.

Cited ante in Avelyn v. Ward, March 19, 1749-50.

Legacy of 400l. East India bonds: only one found at testator's death: not a specifick legacy, but of quantity, and supplied out of the residue.

As to the *East-India* bonds, it will depend partly on the will and codicil, partly on the fact of only one being found, and partly on what was laid down in *Perse* v. *Snabling*. It is very certain, that in this, as in every case, where this question arises, it can only arise, where there is a sufficiency; and there is in the present case. The words are general; and it is very material as a circumstance, that no pronoun possessive is added to the description of the annuities; which is the more observable, because the testatrix in the two legacies immediately preceding adds in terms that very expression *my*. If it happened accidentally to be omitted in the will, which might have been suggested, if it depended entirely on the will, yet in the codicil, wherein she recites the will, she has not added the word *my*, as she has to the two preceding legacies. It is remarkable, that if they existed at the time of making the will, and she had sold them out

at making the codicil, ſhe muſt have taken notice of that ademption, as ſhe has of the *Exchequer* orders, and ſubſtituted pecuniary legacies; it is impoſſible, if that had been the caſe, to give a reaſon why ſhe ſhould not have taken notice of it, and done the ſame to one as well as the other. The want therefore of the expreſſion *my* in the will is ſtrengthened, by what appears on the face of the codicil; which makes a ſtrong argument againſt thoſe, who contend, it was a ſpecifick bequeſt; for it was the diſtinction in *Perſe* v. *Snabling*; which diſtinction was fully eſtabliſhed in *Swinb.* (though he ſometimes contradicts himſelf) but it was eſtabliſhed in other books, *The Digeſt*, *Juſt. Inſt.* and *Miſſinger*'s Comment; which I ſhall only allude to. It is ſaid, that it is to be preſumed ſhe had this property at the time of making the will; becauſe the other legacies are ſomething in *ſpecie*, which ſhe had as part of her property at the time of making the will: but this fact does not warrant the inference, however it happens. It is not to be preſumed, that, becauſe moſt of the other legacies did exiſt at making the will, this ſhould be of the ſame kind; for if that prevailed, it was the very caſe of *Perſe* v. *Snabling*, where that was not of weight. There the teſtator had the identical ſtock exiſting in his name at the time of making that will; *The Maſter of the Rolls* made an equal diviſion among the legatees upon a ſuppoſition of an intent to give but one: *Lord Chancellor* was of a different opinion, and did, what is contended for on the part of the legatee here, that it ſhould be purchaſed out of the reſidue. I own, I am not the leſs ſatisfied with the preſent opinion conſidering the nature of the reſiduary bequeſt: though it is a very good and uſeful charity. It is very different, from what it would have been, if the conſequence of taking this out of the reſidue was to fall on any ſingle perſon. It is ſuch a loſs, as will be contributed to by an indefinite number. Though that would not induce the court to determine it a legacy of quantity without other circumſtances, yet the court is not ſorry, that there are ſuch. This then is not ſpecifick, but a bequeſt of quantity; and to be made good out of the perſonal eſtate of teſtatrix by a purchaſe by the executor of 4 *Eaſt-India* bonds. Let the Maſter compute the intereſt, which theſe bonds would have carried from a year after death of teſtatrix, becauſe I conſider them as a bequeſt of quantity only; for if they were ſpecifick, it would be from the death; and though one bond happened to be found after her death, that I conſider only as accident; and then it would be abſurd, that it ſhould be in a different way from the reſt.

Intereſt from a year after teſtator's death: if ſpecifick, from the death.

+ Reported in 1. Atk. 414.

As to the *South-Sea* ſtock or annuities, theſe according to the true ſenſe and conſtruction of the will are ſpecifick bequeſts; and the laſt is a ſpecifick parcel to the coachman as part of a greater ſum ſtanding in name of the teſtatrix. None of them are independent,

Deviſe of ſtock in ſeveral parcels, ſpecifick; and a deficiency in the ſum not made good out of the reſidue.

pendent, but all connected from the original bequeſt of the firſt portion of *South-Sea* ſtock to the laſt; which ſhe computed to be a reſidue, though erroneouſly; they are connected by this laſt being given by way of remainder; and this is only a ſpecifick bequeſt of ſuch an identical, individual, thing, as the teſtatrix apprehended ſhe had. It is material, that there is a direction to her executors to ſell and convert part of it into money; which direction it is impoſſible ſhe could have given, if ſhe meant, part of this ſhould be purchaſed out of her perſonal eſtate: that was a vain circumſtance, and was laid hold of in *Aſhton* v. *Aſhton*; which is in point; where the court put it upon the deviſe of a real eſtate, which the teſtator had not; the deviſee could not come to have it made good out of the reſidue, it muſt take its fate. There are indeed inſtances, where teſtator had an eſtate, he was in poſſeſſion of at his death, and deviſed it to *A.* who enters, and is evicted, the court has been of opinion, he ſhould have an equivalent; but that was under particular circumſtances, which are not here; like the caſe of *Coventry* v. *Carew*, where an eſtate given to be exchanged with a college; the college would not exchange, though a beneficial one; and the heir at law inſiſted, that as the deviſe could not take effect, it was lapſed: but the court conſidered, that as the deviſee could not have the thing deſigned, he ſhould have the thing in lieu. There are inſtances therefore; where the court has done it; but in general a deviſee cannot come and inſiſt, that ſuch a thing ſhould be made good out of the eſtate of teſtator. The deficiency therefore ought not to be made good out of the reſidue; but the loſs muſt be born in average by the ſeveral perſons intitled according to the proportions deſigned for them, to be ſettled by the Maſter.

Talb. 152.

22 July 1742.

Legacy to the two ſervants living with me at my death. A third taken afterward is intitled. The word *two* rejected, as otherwiſe void for uncertainty.
So on legacy to the three children, when there were four; all intitled.

As to the ſervants: ſuppoſe the teſtatrix had four ſervants, and had ſaid "I give to all the three ſervants living with me at my "death," I think all the four would be intitled to a ſhare; the indefinite word *all* would have warranted the court to have rejected the word *three* as repugnant; for ſhe ſeems to me to have had no particular perſons in view. Here, if theſe three ſervants had left her, and ſhe had taken two or three others in their room, thoſe new perſons would have excluded the others before; becauſe they anſwer in general the deſcription of the perſons ſhe deſigned that bounty for. Then by analogy of reaſon it ſhould be ſo in this caſe; the words, *the two*, being as inconſiſtent, as in the caſe I put the word *all*, &c. *Ut res magis valeat* it muſt be determined in that way, otherwiſe the bequeſt is void for uncertainty; becauſe it is impoſſible to diſtinguiſh which two ſhe meant. But there is a caſe running *quatuor pedibus* with this; *Tomkins* v. *Tomkins* in 1745; where teſtator gave to his ſiſter 50*l.* and to her three children 50*l.* each, in fact ſhe had four children. The words

words were as indefinite, and intended to take in all, as if he had ſaid *all his ſiſter's children*; and the parties were diſpoſed to let them in. *Lord Chancellor* ſaid, if that had not been agreed, his opinion would have been ſo; and relied much on that argument, that otherwiſe it would not be for the benefit of the perſons contending, as it would tend to give the legacy to the reſiduary legatee. Living with her at the time of her death is the circumſtance of her bounty; and if ſhe had taken two more, I ſhould think upon the aforeſaid reaſoning it would be diviſible among the four.

Pit *verſus* Cholmondeley, *July* 30, 1754. Caſe 194.

ON exceptions to Maſter's report the general queſtion was, whether governor *Pit* in his life-time received any and what ſatisfaction for 2000*l.* *South Sea* ſtock, mentioned in an account in 1720. between him and his ſon Lord *Londonderry*; which 2000 *l.* it was admitted, in ſome ſhape governor *Pit* was intitled to a ſatisfaction for, either in *ſpecie* or money, as it was part of 6000 *l.* *Sout.' Sea* ſtock included in a contract entered into between Lord *Londonderry* and *Mitford* and *Mertins* Bankers in *Lombard Street*, in which contract governor *Pit* was intitled to one third.

Account. *Onus probandi* on the party having liberty to ſurcharge and falſify.

The Maſter by his laſt report on a reference ſtated his opinion, that ſatisfaction had been made, and the particular manner in which that aroſe, by a transfer of ſtock by the order of Lord *Londonderry* to governor *Pitt* in 1722.

Difference between that and an open, general, account.

To this way of the Maſter's accounting for ſatisfaction ſeveral objections were made as impoſſible or highly improbable, and two exceptions taken by the plaintiffs; one of which encountered the Maſter's way of accounting for this tranſaction; the other ſet up a way of the plaintiff's own.

LORD CHANCELLOR.

It is certain, that upon this queſtion ſome things appear dark and obſcure; as they muſt in the nature of caſes of this kind, which ariſe on ſuch a tranſaction, particularly in 1720, when they come to be examined after ſo great a length of time: but the court muſt proceed on ſuch evidence, as ariſes on the facts: and I am of the ſame opinion with the Maſter.

Some general obſervations are to be made by way of *poſtulatum*. I am not now upon a queſtion ariſing on an open general account, but barely upon a liberty given to the plaintiff to ſurcharge and falſify. The *onus probandi* is always on the party having that liberty;

for the court takes it as a ſtated account, and eſtabliſhes it: but if any of the parties can ſhew an omiſſion, for which credit ought to be, that is a ſurcharge: or if any thing is inſerted, that is a wrong charge, he is at liberty to ſhew it, and that is falſification: but that muſt be by proof on his ſide: and that makes a great difference between the general caſes of an open account and where only to ſurchaſe and falſify, for ſuch muſt be made out. Now this is not only after a great length of time, but alſo after a number of accounts ſettled between the parties; which adds conſiderable ſtrength to the objections made on the part of the defendant (executor of Lord *Londonderry*;) becauſe after ſuch a variety of accounts ſtated, and ſo often under conſideration, it muſt be a ſtrong caſe laid before the court to falſify. Another thing, material in all theſe caſes, is, that this is a liberty to ſurcharge and falſify theſe ſeveral ſtated accounts between perſons of great ability and capacity and very great experience in that way. It is not like a liberty to ſurcharge and falſify an account (which the court often does) ſtated between a guardian and ward juſt after the ward come of age, or between perſons one of whom is conuſant of the ſubject matter of account, the other not, or not in ſuch a degree; in which the court will take it with a latitude, and make that the ingredient: here the parties were on a par, great and equal ſkill and knowledge on both ſides, and therefore the court expects clear evidence, before they will make any variation.

After theſe general obſervations conſider the evidence. In 1720. a great contract was entered into by Lord *Londonderry* by a tranſaction of 6000 *l. South Sea* ſtock at 500 *l. per cent.* which was purchaſed by him at that rate and amounted to 30,000 *l.* under a contract to be reſold to *Mitford* and *Mertins* for 32,400 *l.* This contract was not performed on the part of *Mitford* and *Mertins*, who broke; and it was not to be expected, their aſſignees ſhould. Undoubtedly under this contract 2000 *l.* was brought to the *debet* of governor *Pit*, who muſt have ſatisfaction for this in ſtock or money: and certainly unleſs ſomething ariſes from the facts and tranſaction in the cauſe, which can take off the force of that transfer, and make it not applicable, it might be applicable to that ſum, though not mentioned *eo nomine*. Was it ſo, or not? It is ſaid for the plaintiff, that this is contrary to many things appearing in the cauſe; firſt from the anſwer of Lord *Londonderry* in 1728. after his father's death, wherein he does not pretend, that he had made ſatisfaction to his father for this contract, but ſtates it as a thing then depending, and that a ſuit was depending with *Mitford* and *Mertins*. Certainly it was not finally ſettled and full ſatisfaction made. The aſſignees inſiſted, it was an uſurious contract; and I believe, the jury found pretty favourably, in finding it was not. The greateſt part certainly remained ſtill to be ſettled: it is ſaid, ſatisfaction

could not have been made; becauſe if it was held an uſurious contract, and the aſſignees had prevailed, that would have reſcinded the whole: but as to that, this ſum was at home. Suppoſe the aſſignees prevailed, and the court held this an uſurious contract, and conſequently that Lord *Londonderry* could not have had a decree, and the aſſignees had brought a bill to have that decree: the court would not have decreed a refunding, which is contrary to the rules of the court in every inſtance. This court does not relieve againſt an uſurious contract to make a man loſe his principal as well as intereſt. But however that be, this is ſaid to be contrary to the nature of the tranſaction, and Lord *Londonderry*'s own bill againſt *Mitford* and *Mertins*, wherein he ſays, he attended on the day, and had *Mitford* and *Mertins* called, and, they not appearing, he ſold this ſtock; ſo that the ſtock being ſold could not be transferred to governor *Pit*, as the Maſter ſays. But I am clearly of opinion, that this allegation in the bill was nothing but a colourable ſale, in the manner as thoſe things were tranſacted in 1720. the mere common courſe of proceeding; ſo that I want no evidence of that; and if this had been in queſtion in 1720. or 1721. a man would be laughed at, who thought this a real ſale. That was a tranſaction, they had eſtabliſhed in *Change Alley*, to which courts of juſtice gave way, (though *Holt* has ſaid, he would not ſuffer *Change Alley* to give law to *Weſtminſter-hall*). Where a contract was for delivery of ſtock at a diſtance, they came on the day, and ſtaid until the laſt period of time of doing the act, making the transfer, then had the buyer called to come in and accept the ſtock, otherwiſe it would be ſold. In ſome inſtances perhaps they might make a real ſale: but if not, they had it transferred at the price to ſome perſon for them. The ground, they went on, was, that there was occaſion to alter the property of the ſtock; for otherwiſe, if the ſtock remained in the hands of the vendors, it might have riſen again; and then if the ſtock bargained for remained at home without alteration of the property, the buyer would have ſaid, he would take the ſtock, and pay the money. But I do not go barely upon ſpeculation and memory, but think Lord *Londonderry*'s bill clearly ſhews this to be the method and conſtant uſage. There is then no contradiction between this ſtated by the Maſter and the fact ſet forth by Lord *Londonderry* in his life; and there is not ſufficient ground to ſurcharge theſe accounts with that ſum, or to ſay this was an error; and if I ſhould do ſo, I ſhould make the ſtrongeſt preſumption of ignorance in theſe parties, that ever was made. I lay weight principally on this, that what is called a ſale, is only colourable, and that this 6000*l.* remained at home, and was to be accounted for. In theſe accounts governor *Pit*, who appears to have uſed great caution in his affairs, could not have paſſed this over.

Uſurious contract: the principal not loſt as well as intereſt.

Transfer of ſtock in Change Alley on colourable ſale given way to in courts of juſtice.

The exceptions muſt be over-ruled.

Hucks

Caſe 195. Hucks *verſus* Hucks, *July* 31, 1754.

Maſter of the Rolls for Lord Chancellor.

Son not in being cannot take leſs than eſtate tail.

BY articles before marriage, *Joſeph Hucks* covenants, that if he ſhould beget on his intended wife one or more ſon or ſons, he would ſettle lands of 200 *l. per annum* to wife for life for a jointure, and afterward to truſtees to preſerve contingent remainders, for the firſt ſon begotten on her body, and to the firſt ſon of ſuch firſt ſon, with remainders over, but with power to the huſband to receive the profits during his life.

In marriage articles limitation to firſt ſon, and to firſt ſon of ſuch firſt ſon, an eſtate tail to firſt ſon.

He left one ſon by the marriage, the preſent plaintiff; who was decreed an eſtate tail in the lands to be purchaſed. Even if the parties had deſigned an eſtate for life, it ought not to take effect; as in point of law a ſon not in being cannot be conſidered to take a leſs intereſt than an eſtate tail, when he comes in being. *Humberſton's* caſe, 1 *Will.* 332.

But lands purchaſed by the father were conſidered as a ſatisfaction *pro tanto*, and part-performance.

Note; A caſe was cited upon the will of the Duke of *Marlborough*, the drawers of which did not attempt to make the ſons, who were to be born, tenants for life, but inſerted a power in the truſtees to reduce the eſtate-tail to an eſtate for life, upon a tender to the truſtees by the tenant for life after he had a ſon; which was long a queſtion, how far that was good or not; and *Lord Chancellor* called in the aſſiſtance of the judges, and thought it going a great way toward a perpetuity: but upon the death of the Dutcheſs it never was determined.

Caſe 196. Elliſon *verſus* Airey, *Auguſt* 1, 1754.

Charge by will of the whole real eſtate in aid of perſonal for debts and legacies, not reſtrained by ſubſequent deviſe of a particular part for that purpoſe, without negative words.

FRANCIS NICHOLS by will charges all his perſonal eſtate with debts and legacies; and ſo much as the perſonal eſtate ſhall fall ſhort to anſwer and pay, he charges all his meſſuages, lands, and grounds in *Durham* with payment thereof in aid of the perſonal eſtate, and directs the perſonal to be ſold. By a ſubſequent clauſe he gives a particular farm to be ſold for payment of his debts and legacies; and by another clauſe deviſes all his real eſtate ſo charged and chargeable to truſtees to receive and take the firſt two years profits, that ſhall ariſe and become payable out of his eſtate in

in *Durham*, for payment of his debts and legacies, if the perſonal eſtate proved deficient, and to the maintenance and education of his nephew in ſuch manner as the truſtees ſhall think fit, and no more.

It was inſiſted, that only that particular part and the two years profits were charged, the generality of the firſt charge being controuled and reſtrained thereto expreſſly.

LORD CHANCELLOR.

Upon all the rules of charging for payment of debts the whole truſt eſtate is ſubject to payment of debts and legacies: the firſt charge of the perſonal eſtate therewith was unneceſſary. Afterward there is a full and compleat charge on the real of ſo much as the perſonal proved not ſufficient to ſatisfy. It muſt be ſomething very ſtrong in the will to reſtrain that charge to a particular part, and go no further. If it reſted on the clauſe, which gives the farm, would the expreſs direction of the will to ſell a particular eſtate toward payment of thoſe debts and legacies, that the perſonal eſtate was not ſufficient for, afford a negative implication, that no more ſhould be ſold? Certainly not; for there are ſeveral caſes, where there is a charge of the whole eſtate for payment of debts, and afterward a direction that a particular part ſhould be ſold; that has been taken only to be a declaration of the intention, that that ſhall be firſt applied. Then the ſubſequent part is no more, than what is done by the former clauſe, taking out a particular part; as one was of the inheritance, the other the profits. If indeed negative words were added, it cannot go farther: but I take thoſe negative words, *and no more*, to be applied to the maintenance. There are ſeveral caſes of a general charge by words not near ſo ſtrong as this, and a deviſe afterward of a particular eſtate for that purpoſe, yet that was not ſufficient to reſtrain it. That was the caſe of Lord *Warrington* v. *Booth*. This general charge then ſubſiſts; and I cannot make any other conſtruction.

Woffington *verſus* Sparks, *Auguſt* 2, 1754. Caſe 197.

At the Rolls.

Bonds.

Aſſignment of bond to co obligor, who pays it, is of no uſe; as *indebitatus aſſumpſit*.

THE plaintiff joined as ſecurity for another in a bond for the payment of 150 *l.* lent by *Sparks*, and now brought a bill againſt both, that the obligee might either put the bond in ſuit againſt the principal, or aſſign over the bond to the plaintiff, that even the principal may plead payment to action in name of obligee; but caſe lies, or perhaps

the plaintiff might do it; ſuggeſting that the obligee had refuſed ſo to do, when the principal was declining in his circumſtances.

Sir *Thomas Clark.*

The aſſignment would be of no uſe to the plaintiff; for if the co-obligor in the bond paid it off, the principal might take advantage of that, and plead payment in bar of an action inſtituted by the plaintiff in the name of the obligee, as it muſt be. There is no doubt of that; becauſe the bond was given only for the payment of one ſum of money, and, when once ſatisfied to the obligee, is *functus officio.* There was a caſe of *Gammon* v. *Stone*, 7 *Dec.* 1749. upon that very point of the neceſſity or non-neceſſity upon the obligee to aſſign to the plaintiffs, repreſentatives of a ſurety in the bond, who had tendered the money. *Noy* 75. was there cited: *The Attorney General* laboured it exceedingly for the plaintiffs; but *Lord Chancellor* held, that the aſſignment was not to be inſiſted on, becauſe it was quite an uſeleſs thing. That was accompanied with the ſtronger circumſtance of a tender: here there was no ſuch thing as a preparation for payment of the money. But it is ſaid, though this is ſo in the caſe of a bond, a judgment would have been different: conſider how that is. Suppoſe execution had been offered to be taken out upon that judgment; if that judgment was entered up after the money was paid, no doubt but that the *King's Bench* would have ſet it aſide: I mean, a judgment entered up in conſequence of a motion for liberty to enter up judgment on a ſtale bond by the obligee after ſuch time as he had received the money. But taking it the other way, that the money was not paid, when the judgment was entered up; if execution were offered to be taken out upon the money's being paid afterward, it is allowed relief might be; I believe there might be an injunction (as it has been ſaid) upon a bill here: but that brings it, to what is now the queſtion: for the plaintiff is now juſt in as good a condition, as ſhe would be then, being now plaintiff, and having filed a bill againſt the obligee and her co-obligor. But it does not reſt there: the plaintiff had no occaſion for this circuitous way; for ſhe might have paid the bond, and had the remedy in her own hands; for though it might be a doubt, whether or no a general *indebitatus aſſumpſit* would lye upon the implied contract for the ſurety, who had paid the bond, to recover the money back again from the principal, there is no doubt but that, independent of that queſtion, a ſpecial action upon the caſe muſt always remain, if a ſurety pays money for a principal on a bond, having no counter bond. One remedy or the other was in her own hands: conſequently the lacheſs was her own. There is not a ſufficient ground to relieve the plaintiff upon any other than the common terms, againſt the penalty, as the defendant is in the caſe of a common creditor.

The

The plaintiff reimburſed her coſts againſt the co-obligor.

Wortley *verſus* Birkhead, *Auguſt* 3, 1754. Caſe 998.

Demurrer. Puiſny incumbrancer may *pendente lite* take in the firſt and gain a preference to a ſecond, by tacking the firſt to the third: but not if done after a decree and direction to ſettle the priorities; for that would open a door to colluſion between creditors.

A Decree had been made in 1748. in a cauſe, wherein the now plaintiff and defendants among other creditors were plaintiffs, for the ſale of the eſtate of one *Manaton*. The Maſter was directed to inquire into the priority of the demands. The plaintiff bought in an incumbrance in 1694. and made a claim before the Maſter to have it tacked to his mortgage, and thereby to be paid before the defendants: the Maſter refuſed to make any report as to that; whereupon the plaintiff filed this bill.

A Demurrer was put into ſo much and to ſuch part of the bill, as ſought to have a ſatisfaction for the money claimed by the plaintiff to be due under the ſecurities in the bill ſet forth in preference to defendant's mortgage.

For defendants. The demurrer is for want of equity in the bill, which is of a new kind; an original bill to alter a direction under a decree between the ſame parties. That never is allowed, unleſs for fraud. The opinion of the court in one decree cannot be varied by original bill; nor can the decree be affected but by ſuch proceedings, as will alter the decree itſelf. Upon error in the decree, apparent or newly diſcovered, there may be a proper bill of review: or if it is not inrolled, there may, according to the practice now eſtabliſhed by *Your Lordſhip*, be a ſupplemental bill in nature of a bill of review, and application to rehear at the ſame time; which is an improper bill of review: but then if altered, the whole progreſs is altered. Either the matter is or is not concluded in the former decree, and either way this bill is improper. Upon a motion made for an order that the Maſter ſhould be directed to receive evidence of this new diſcovered deed, *Your Lordſhip* refuſed it, thinking it a new attempt, leaving it before the Maſter, to whom the queſtion of priority is properly referred; and upon exception to the report it will finally come. They muſt firſt get rid of that decree by ſome of the ſaid methods; not by an original bill to vary the right as it ſtood then, by ſomething afterward; and it is not like a diſcovery of that evidence, which if then before the court, there would have been a different decree. But upon the merits; it never has been held, that a ſubſequent mortgagee after a decree, to which he is himſelf a party, can take in a prior incumbrance in order to ſhut out a meſne incumbrancer. That would be attended with great fraud and confuſion, and there would be no end of it; for then if any other perſon got a deed of a prior date, he might bring a

new

new bill, and overturn all. The rule is indeed eſtabliſhed in *Marſh* v. *Lee*, 1 *C. C.* 162, and 2 *Ven.* 337. that a third mortgagee might take in a prior mortgage or judgment, and exclude the ſecond: but it was a hard rule, and has been doubted of by ſome judges: and though it is eſtabliſhed, yet ſeveral diſtinctions out of it have been made, laid down in *Brace* v. *Dutcheſs of Marlbrough*, 2 *Will.* 491. But no caſe has gone ſo far as to ſet up a priority after a decree. *Earl of Briſtol* v. *Hungerford*, 2 *Ver.* 524. beſide no legal advantage could be gained; for it is above 60 years ago.

For plaintiff. This aroſe incidentally before the Maſter, and not appearing at the time of the decree, there may be a ſupplemental bill thereon to enable the court to do compleat juſtice: there is no report, nor decree ſigned and inrolled. As things ſtood at the decree, the plaintiff was a prior incumbrancer under a mortgage in 1726. for the deed in 1724. which the defendants have ſince brought in before the Maſter, did not then appear; it was only recited in their deed in 1727. and no relief was prayed under it. The court directed the Maſter to ſtate the priority of the incumbrances, and to inquire whether there was ſuch a deed in 1724. not determining any thing; and therefore the Maſter could only report in purſuance of that direction, and leave it to the court to judge upon it; ſo when that deed in 1724. was diſcovered by the defendant, and brought before the Maſter, they thereby gained a priority againſt the plaintiff; who, not having the leaſt notice of that deed at the time of lending his money, began then to look about for an older deed, which he had no occaſion to do before; and, having found this in 1694. took it in to protect himſelf, and produced it before the Maſter, who would only report as to the deed in 1724; and the plaintiff, not prevailing in the motion, has now taken this as the only method to have juſtice done. Whoever has the merits, it is not proper to cut it ſhort by demurrer. A purchaſer for valuable conſideration without notice is regarded in the moſt favourable light. The facts in the bill muſt be taken to be true: the ſtaleneſs of this prior incumbrance is no objection; for the court will not by preſumption, that it is ſatisfied, aſſiſt againſt it. The rule is admitted, and, though looked on as a hard caſe, was determined on principles of equity; which if varied, there will be no knowing where to go. Here the plaintiff has regained his priority; and the law does not ſtop any where; for wherever it can be done, a court of equity does not impeach it; for though the legal eſtate has been got *minus juſte*, yet the law and equity will prevail againſt equity; or, where equity is equal, the law ſhall prevail. *Marſh* v. *Lee*, and 2 *Ver.* 29, and 159. The queſtion then is, whether the plaintiff has loſt that priority by not getting it early enough? It is only an interlocutory decree to ſee, how the priorities ſtand at that time: that was the ground of the Maſter's not allowing the plaintiff to come in; becauſe tho'

a lien upon the land, it was not ſuch in the plaintiff, as could at the time of the decree be taxed. Until a final decree there is no judgment. An interlocutory judgment in a bill for diſcovery of aſſets is not pleadable, not affecting until it comes to be final: for a judgment to account is only interlocutory; and cannot be uſed as a judgment. So in the preſent caſe; if the plaintiff get a priority before judgment, that equity is got, which always is allowed; and the legal eſtate is ſuch, as can be tacked to it. In *Ld. Briſtol* v. *Hungerford* there was a report, and therefore probably a final decree. The plaintiff will have the ſame juſtice to have this done now, as when the decree was made; at which time if he had got it in, there is no doubt; and it is right to have an inquiry made on a new fact: but he could not bring a bill of review, as that would be praying to have that part reverſed, which the plaintiff now deſires to ſtand, that priority may prevail. Suppoſe articles for a purchaſe; a decree to ſee whether defendant can make a good title: if he can at any time before the report, it will be good. 2 *Will.* 630. The law looks on theſe things to be at the time, when judgment is finally to be given; and then the plaintiff apprehends, he will have a priority, from which he is not to be barred.

LORD CHANCELLOR.

Two queſtions come before the court by this demurrer. Firſt, whether the plaintiff has that equity, he inſiſts on by his bill? Next, ſuppoſing he has, whether he has purſued a proper remedy?

The demurrer goes not to the whole bill; ſo that the whole matter demurred to is not the plaintiff's having ſatisfaction out of the eſtate upon the judgment, of which he has taken an aſſignment; but to that particular point of ſatisfaction, the preference, he claims, to have the judgment tacked to his mortgage of 1726. ſo as to give that a preference in point of payment; and upon that this queſtion ariſes.

As to the equity of this court, that a third incumbrancer having taken his ſecurity or mortgage without notice of the ſecond incumbrance, and then being *puiſny* taking in the firſt incumbrance, ſhall ſqueeze out and have ſatisfaction before the ſecond, that equity is certainly eſtabliſhed in general; and was ſo in *Marſh* v. *Lee* by a very ſolemn determination by Lord *Hale*, who gave it the term of the creditors *tabula in naufragio*: that is the leading caſe. Perhaps it might be going a good way at firſt; but it has been followed ever ſince, and, I believe, was rightly ſettled: but rightly ſettled only on this foundation, by the particular conſtitution of the law of this country. It could not happen in any other country but this; be-

cauſe the juriſdiction of law and equity is adminiſtered here in different courts, and creates different kind of rights in eſtates; and therefore as courts of equity break in upon the common law, where neceſſity and conſcience require it, ſtill they allow ſuperior force and ſtrength to a legal title to eſtates; and therefore where there is a legal title and equity of one ſide, this court never thought fit, that by reaſon of a prior equity againſt a man, who had a legal title, that man ſhould be hurt; and this by reaſon of that force this court neceſſarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a queſtion; for if the law and equity are adminiſtered by the ſame juriſdiction, the rule, *qui prior eſt tempore potior eſt jure*, muſt hold. This has gone ſo far, (and the original caſe was) that if a *puiſny* incumbrancer took in the firſt incumbrance *pendente lite*, ſtill he ſhould have the ſame benefit; for in *Marſh* v. *Lee* there was a *lis pendens*, yet was not the party affected with it; and ſo, I take it, in general it would be notwithſtanding a *lis pendens*; becauſe the principle, upon which all theſe caſes depend, is this, that a man's having notice of a ſecond incumbrance at the time of taking in the firſt does not hurt; it is the very occaſion, that ſhews the neceſſity of it. It is only notice at the time of taking in the third, that will affect him; for then no act, he can do, will help him. Then a *lis pendens* is nothing but notice; and actual notice is certainly as good as that by a *lis pendens*; one notice is in conſideration of this court as ſtrong as another. Nay actual notice is ſtronger than that implied by a *lis pendens*; it will not therefore affect him. That was *Marſh* v. *Lee* and the other caſes, which I agree to. But no caſe is cited, wherein a *puiſny* incumbrancer, a party in a cauſe, and a decree made in that cauſe for ſatisfaction of incumbrancers according to their reſpective priorities, has taken in a prior to tack to his *puiſny* incumbrance, that he ſhall be allowed to make uſe of that in any other ſhape, than that original incumbrancer would be. I am of the ſame opinion, as Lord *Cowper* was in the *Earl of Briſtol* v. *Hungerford* in general, and do think, it would be moſt miſchievous and pernicious, if the court ſhould allow that doctrine of tacking to be carried to that extent. Firſt, taking it upon the terms of the decree, all theſe decrees, where there are ſeveral incumbrancers before the court, a ſale directed, and every thing neceſſary to be done to clear the eſtate in order to that ſale, proceed on this foundation; that the rights of the parties are to be taken, as they ſtood at the time of the decree; and therefore direct an inquiry into the priorities. What are thoſe priorities? Such as they ſtood at the time of the decree: not that afterward the priority ſhall be varied. The Maſter is only to inquire, and that is into the condition it ſtood in at the time of making the decree. It is very different from the caſe put for the plaintiff, of a decree to inquire as to a good title. Certainly where there is a contract for ſale of an eſtate, difficulties to the title often happen, which muſt be cleared up afterward; and then, what was

Notice.

ſaid

ſaid for the plaintiff, ſhall be allowed. But the terms of theſe decrees are very different. Not to reſt upon the niceties of the words of theſe decrees the ſenſe, reaſon, and juſtice of the caſe require it; for otherwiſe where an incumbrancer on an eſtate, which is affected with ſeveral incumbrances, brings a bill for ſatisfaction of his incumbrance, and all proper parties, and has a decree for it as between himſelf and the owner of the equity of redemption; ſome of the incumbrancers are prior, others poſterior, to his; if it is allowed, that after ſuch a decree is made, one of thoſe defendants, who happened to be prior to him, ſhould convey to another defendant, who was *puiſny* to him, it would ſhut out the plaintiff after the decree made, at which time the rights are to be conſidered. What would be the conſequence? Nothing could lay a foundation for greater colluſion and contrivance between the parties, to exclude each other, than ſuch a liberty would, and to the great deceit of the plaintiff; for then a man ſhall loſe his coſts by ſuch a proceeding, the plaintiff having a right to his debt, principal, intereſt, and coſts according to the reſpective priorities; and that is the direction of this decree; and here was a ſufficient fund according to his then right to pay all that: but after that decree was made, two of theſe defendants may by colluſion give a third incumbrancer more than his debt (and it would be worth while to do ſo) in order to exclude the plaintiff, who happens to be a ſecond incumbrancer. It would be carrying ſecurities to market in that manner; whereby the purchaſer of them ſhall not only ſtand in the place of the party ſelling, but would acquire a new equity, which it would be miſchievous to allow; I mean in general caſes. This is juſt the ſame to perſons incumbrancers, who were not parties to the ſuit, but who will come in under the decree; for they muſt come in upon and ſubmit to the ſame terms of that decree, though no parties; and therefore this judgment-creditor of 1694. if they could not make a title without him, muſt have come in under the terms of the decree to receive a ſatisfaction out of the purchaſe-money, but ſhall not be ſuffered after this decree made to aſſign his judgment ſo as to give a new right to the aſſignee of it, not only to receive his, but to increaſe that firſt incumbrance. That doctrine is contrary to the meaning of theſe decrees, and to the juſtice of the caſe, and would open ſuch a door for traffick and marketting between creditors, as would introduce miſchief, and therefore is not to be allowed. This is ſaid to be an interlocutory decree, and like a decree *quod computet*: but why is it interlocutory? It is the judgment of the court, and not in the nature of ſuch a decree, *quod computet*; which depends on a different reaſon. Therefore I never was clearer in opinion than upon this part of the caſe as to the general right. If the plaintiff can diſtinguiſh this from the caſes, that might be a different conſideration; and that will depend on his manner of charging it: but this is my opinion upon the general right.

But

But admitting the plaintiff may have this, or admitting it doubtful, and not proper to close on a demurrer, the question is, whether he has pursued a proper method to obtain that? I am of opinion, he has not. First, taking this as a general question, it is a point, the plaintiff might have come at under the former decree; because there is a direction to take an account of what was due for principal and interest upon all the incumbrances, and to inquire into the priorities of them; therefore, taking it upon the general state, he should have come in before the Master, and said, that, though subsequent to the decree, he had taken an assignment of this judgment, which should be tacked to his mortgage, and therefore he had the priority. This question of priority he might have brought before the Master, and that without any new bill, and then it might have come properly before the court upon exceptions: but the Master's opinion will not be a ground to bring a new bill. The utmost, that could be wanting as to bringing a bill, would be this; if the judgment-creditor must have brought a bill for satisfaction, then perhaps the plaintiff standing in his place might; but I do not see, why the judgment-creditor could not, for it was an incumbrance hovering over the estate. But I think it would be a bill in nature of a bill of review with supplemental matter; and indeed on looking over this it looks like a bill of that kind, (but there has not been the leave of the court for it,) for it is said in the bill, there is a new matter discovered. What has he discovered? Not a right in himself, but in another person: but that would not be a foundation for such a bill of review; for the new matter must be new to shew that the right of the party, who brings the bill of review, existed at the time of making the decree, but was not known to him at that time. But this is a right in another person, who was not hurt by that decree: but has since taken an assignment of this judgment and prior mortgage, and that is new matter, but not existing at time of the former decree: and therefore I doubt, that will not bring it within the rule. The only thing, which can bring it within the rule, is, that in the former cause this mortgage in 1724. was so charged, that the present plaintiff could not know, how far he was affected by it; for that they stated it only by way of recital; and that it did not appear, whether that affected the same lands; and therefore the present plaintiff might be misled thereby, and prevented from helping himself and getting this *tabula in naufragio*, which otherwise he might have done. If there is any ground for that, it may create another consideration: but not on this bill in this manner: it might be by bill of review for new matter. The court has so far taken notice of that deed in 1724. as to direct an inquiry as to all the incumbrances, and particularly whether any mortgage was made in 1724. preceding that in 1726. That inquiry was directed, because that did not then appear: but when that inquiry is made, if the Master finds,

Bill of review must be on new matter to shew the right of the party existing, but that it was not known to him, at the time of the decree.

finds, there was ſuch a mortgage, that mortgage falls under the direction in the decree to take an account of the ſeveral incumbrances: and therefore it is particularly taken notice of in this decree.

I am of opinion therefore, that in the point of equity inſiſted upon it would be attended with miſchievous conſequences; but if there is any thing in that, they muſt come at it in another method, and cannot by this bill. Therefore let the demurrer be allowed.

Kinſey *verſus* Kinſey, *Aug.* 3, 1754. Caſe 199.

PLEA of a decree in a former ſuit as having determined the matter, wherein the preſent defendant was plaintiff, and the preſent plaintiff in his anſwer thereto inſiſted on the ſame matter, he had charged by this bill; that there was a decree *niſi* by default, which was made abſolute upon no cauſe ſhewn.

Decree not ſigned and inrolled cannot be pleaded.

It was ſaid, this bill was filed before that decree and to have a diſcovery; that the decree cannot be pleaded, becauſe it was not ſigned and inrolled; and the *caveat* was entered to prevent inrolment, that the cauſe may be reheard, and both come on together.

Caveat to ſtop inrolment for 40 days.

LORD CHANCELLOR.

The great objection to the defendant is, that the decree is not ſigned and inrolled. It is a matter of great conſequence to the proceedings in this court; for it often happens, that the court will not delay the original cauſe by reaſon of the depending of a croſs bill. Indeed in general the court cannot do it, unleſs ſomething appears to warrant it. So that the plaintiff in the original often happens to get a decree: but the plaintiff in the croſs bill may by *caveat* ſtop the inrolment for forty days, petition to rehear, and bring on both together. Then the queſtion is, whether by the ſtrict rules you can plead that decree, that is not ſigned and inrolled? You may inſiſt on it by anſwer; but that is another thing; this cannot be inſiſted on by way of plea. Let it ſtand for an anſwer with liberty to except, and ſave the benefit to the hearing.

Caſe 200. Anonymous, *Aug.* 6, 1754.

Publick books, as of a manor court, ordered to be produced: but not books in private hands.

MOTION for liberty to examine the books of the manor of *Netherbury* near *Sarum*, to prove the admiſſion of the plaintiff's anceſtor to a copyhold eſtate, which was ſaid to be purchaſed with notice of plaintiff's title, and this admiſſion being neceſſary for the plaintiff's title.

LORD CHANCELLOR.

I have no authority to make an order to take copies of books of this kind except publick books, as court-rolls, *&c.* If it is a queſtion between perſons, who are tenants of the manor, the court will make an order on the Lord or Steward to produce the court-books. Nay ſo far I will go, that if a book was aſcertained or ſhewn to me to be a court-book or of the court-roll of the manor, and it got into the hands of another perſon, I ſhould take that perſon to ſtand in the place of the Lord of the Manor or his ſteward, and make an order on him to produce it; but that muſt be firſt ſhewn to be a court-book: whereas here is a book in the hands of a private perſon, proved to be the contrary to a publick book. It would break through all ſorts of rules to grant it as to that. The plaintiff may file a ſupplemental bill, and make the perſon a party, and ſo get at it; but not in this ſummary way.

Caſe 201. King *verſus* King, *Aug.* 6, 1754.

Supplicavit or rule for ſurety of peace, not diſcharged, unleſs on a falſity or contrivance.

MOTION on the part of the huſband to diſcharge an order for a *ſupplicavit* on the part of the wife.

It was made on affidavits; and ſaid to be more proper for friends to interpoſe than a court of juſtice.

LORD CHANCELLOR.

I think ſo too: but when it does come before a court of juſtice, the court muſt go according to its rules. I never knew a writ of *ſupplicavit* or rules for ſurety of the peace in *B. R.* diſcharged, unleſs it has appeared to be a mere contrivance and falſity; and then in a particular inſtance (or two, I believe) I have known them diſcharged. The reaſon is, that they are for prevention; if therefore the parties conclude, they believe their life to be in danger, the court will not try theſe facts on affidavits on both

ſides in ſuch a caſe. It muſt therefore be ſome ſtrong caſe to ſhew, that it was a mere contrivance or falſity, that will be a ground to diſcharge a writ of *ſupplicavit* or rule of ſurety of the peace: but here the facts are not at all denied, and I am to take care of the perſon who ſwears her life is in danger. I cannot diſcharge this order.

Lubiere *verſus* Genou, *Aug.* 6, 1754. Caſe 202.

MOTION that depoſitions in the croſs cauſe might be read on the account directed on the original cauſe; for though the croſs bill is diſmiſſed, that does not vary the truth of the depoſitions. Ibid. Depoſitions in croſs cauſe, read on the account, though the bill was diſmiſſed.

Maſter of the Rolls granted it, ſaving juſt exceptions.

Ex parte Higham, *Aug.* 8, 1754. Caſe 203.

HUSBAND petitions, that his wife's fortune, near 1000*l.* ſhould be paid out of the bank to him. They had been married about half a year; the wife was lately come of age; and being preſent in court, was very deſirous it ſhould be ſo; and the huſband ſaid, he could make much more of it in the way of trade of a trunk-maker than to make any ſettlement of it upon his family. The whole of wife's fortune, preſent and conſenting, not paid to huſband.

Lord Chancellor ſaid, though he might do ſo, he might alſo ſpend it; and would not ſuffer the whole to be paid to him; but let him have the greater part, the remaining 400*l.* to be ſettled on his wife and family.

Kemp *verſus* Mackrell, *Aug.* 8, 1754. Caſe 204.

ON exceptions to the Maſter's report for allowing ſeveral notes to be brought into the account by the plaintiffs, aſſignees of *Cordwell* a bankrupt, ſeveral iſſues were directed to try the validity of thoſe notes. They were all found forged after a trial of four days in *B. R.* Exhibits found forged cannot afterward be ſaid to be immaterial, nor will the court go into other evidence, the verdict being deciſive.

It was now ſaid for the plaintiffs, that whether thoſe exhibits were true or falſe, there was other evidence, which made them immaterial.

LORD

LORD CHANCELLOR.

Whether this is the caſe of aſſignees under a commiſſion, or of a perſon ſuing in his own right, I muſt go by the ſame rule. When iſſues are directed either on hearing of the cauſe or on exceptions upon facts of this kind, it is afterward taken to be deciſive as to the fact directed to be tried, and as to the conſequence of that fact, unleſs it is a diſtinct conſideration; as where there was a double conſideration, whether the deed was forged or not and the conſideration of equitable circumſtances. It is now ſaid, that whether theſe exhibits are true or falſe, there is other evidence which makes them immaterial. If the court ſhould now go into that other evidence, there would never be an end of things; therefore for the ſake of precedent I will not do what is now deſired by the plaintiffs. The parties muſt abide by the defence they ſet up; and if they ſet up a forged defence, they muſt reſt upon it, and cannot afterward ſay, that piece of evidence is nothing to the purpoſe. Therefore I ſhall take this verdict, found after ſo long a trial, to be concluſive upon all theſe exceptions; which muſt be all allowed in conſequence of the verdict; and I will direct all theſe notes to be cancelled by a line drawn through them, and to remain in the hands of the Maſter ſubject to further order.

Coſts dye with the party, if not taxed. But that is a hard rule, and ſeveral exceptions are allowed; as where a duty is decreed; or where out of a particular fund, though nothing more to be done.

On the original bill againſt the preſent defendant's father an account was directed, and coſts to the hearing given to him as well as the plaintiffs; but his croſs bill was diſmiſſed with coſts. He died; and an exception was now taken by the plaintiffs, becauſe the Maſter had not allowed them the coſts of that diſmiſſion.

For Plaintiffs, the general rule was admitted, that coſts being a perſonal injury, follow the rule of law, and dye with the perſon, and there cannot be a reviver for coſts alone: but though a court of equity follows that rule, it is allowed to be a very hard caſe, and there are ſeveral exceptions thereto: as where coſts are connected with the duty, or if there is any fund out of which they are to be paid, tho' the party dies, ſtill coſts ſhall be paid out of that fund. The reaſon of the rule is, that the decree is at an end: but here the decree ſubſiſts, and muſt be performed throughout, and the two cauſes are connected.

For defendant. The croſs bill being diſmiſſed with coſts is at an end; is connected with nothing elſe, and out of court as much as if it had been a ſingle bill only; and the whole decree is pronounced in the original cauſe. The plaintiffs might have gone before the Maſter for thoſe coſts. The general rule is admitted,

mitted, and this caſe is not within any of the exceptions; and then there cannot be a revivor or proceeding for thoſe coſts not made a duty before death of the party.

LORD CHANCELLOR.

To be ſure the general rule is ſo; that where a bill is diſmiſſed with coſts, and nothing is done by the decree but giving the coſts, and nothing remaining to be done; by death of the party before the coſts are taxed they are loſt: if taxed, there may notwithſtanding the death be a proceeding for them againſt the repreſentative of that party. That is the rule of the court, and the diſtinction upon which it is founded: yet it has been always ſaid to be a hard rule, and to turn on a very nice diſtinction, *viz.* whether there has been a taxation or not. The right is as certain before taxation as afterward. Wherever the court ſees a reaſonable foundation out of that rule, the court always allows it; and I am of opinion this is one of thoſe caſes; for wherever any thing of a duty has been decreed, there undoubtedly it is out of the rule; or wherever coſts are given out of a particular fund, though nothing more is to be done, the court has taken it to be out of the rule. I determined it ſo in one or two caſes of late; and it is right ſo to determine to anſwer the juſtice of the caſe. Here is a cauſe heard on bill and croſs bill at the ſame time; the court makes an intire decree; diſmiſſes the croſs bill with coſts, and then goes on to give the defendant coſts to the time of the hearing, and that if any ſurplus remains, that ſhould be paid to the plaintiff in the original cauſe; ſo that thoſe coſts given at the hearing, were to come out of that fund. The croſs bill is conſidered as one part of the defence: The court has ordered the defendant to pay coſts on one part of his defence, and that he ſhould have coſts on the other; then ſhould not thoſe coſts given againſt him be deducted out of thoſe to be given to him on the other part of his defence to the original bill? I am not clear, that the plaintiffs could have gone before the Maſter to tax the coſts given againſt the defendant's father; for he might have ſaid, that there was a long account, and that coſts on the original bill were given to him, that therefore one ſhould be deducted out of the other, and that the plaintiffs in the original ſhould not proceed to recover thoſe coſts given againſt him, and leave him to take his chance to recover thoſe given for him out of the eſtate, until the event of the whole is ſeen. They are therefore connected together. Here is a long account, and the croſs bill is part of the defence to the original. This brings it within thoſe caſes, where there is a fund out of which it is to come. I am of opinion therefore, the Maſter ought to allow theſe coſts.

Ante. White v. Hayward, 25 July 1752, and Johnſon v. Peak.

Caſe 205. Tudor *verſus* Anſon, *Auguſt* 9, 1754.

Defect of ſurrender of copyhold, ſupplied for widow, children, but not for a grand child, or natural child.

AT the hearing 22 *July* laſt, the defect of ſurrender of the copyhold to the uſes of the will was directed to be ſupplied in favour of the widow and children; the court declaring it need not be ſaid, they were unprovided, for the father was a judge of that: but that a grandſon or natural child has been held not within the rule, and *a fortiori* a couſin of the teſtator is not.

It is ſupplied for creditors, where no other real eſtate, and a general deviſe of real eſtate after a direction to pay debts.

A petition was preſented by the creditors to rectify the minutes by extending the direction to them; the will being introduced with theſe general words, "*I will, that all my juſt debts and "funeral expences be paid and ſatisfied.*" The teſtator left no other real eſtate; and therefore the general deviſe will carry the copyhold, and be a charge for payment of debts in aid of the perſonal eſtate; 1 *Ver.* 411. 2 *Ver.* 229, 708; and Lord *Warrington*'s caſe; and *Colley* v. *Mickleſton*, 20 *May* laſt, where the words were, "I will, "that my debts and funeral expences be firſt paid and diſ-"charged," and then followed particular, diſtinct deviſes of his real eſtate.

This was not oppoſed, it being the intention of the court at the hearing; and *Lord Chancellor* ordered the defect of ſurrender to be ſupplied for benefit of creditors, if the perſonal eſtate proved not ſufficient.

Caſe 206. Ex parte Dumas, *Aug.* 9, 1754.

Bankrupts. Merchants abroad draw bills on correſpondent for a particular purpoſe, and remit other bills to anſwer that: the correſpondent becomes bankrupt: thoſe bills remaining unnegotiated muſt be delivered up by aſſignees, or the money received by them thereon, to the original owners.

TWO houſes of merchants were correſpondents, *Dumas* and Co. at *Paris*, *Julian* and Co. at *London*, and they had in general a dealing between themſelves. During the courſe of that, and not long before the bankruptcy of *Julian*, the former drew bills of exchange to the amount of 1115*l.* upon the *Julians*, with an order to place thoſe to a particular account marked letter G. The *Julians*, partners here, accept thoſe bills, and in their anſwer expreſsly declare, they will place them to that particular account. The partners at *Paris* ſoon after draw other bills of exchange on other perſons here for the ſum of 1146*l.* 11*s.* 11*d.* theſe they ſend to their correſpondents the *Julians* with a direction to place them to the account letter G; and it was ſworn, that this was done in order to anſwer and re-imburſe the *Julians* for what they ſhould pay upon the bills ſo drawn before upon them. The former

mer bills not being paid when due, are ſent back proteſted; and the *Julians* become bankrupt. Part of the latter bills of exchange remaining unnegotiated at the time of the bankruptcy to the amount of 580*l.* the petition prayed, that the aſſignees under the commiſſion ſhould return thoſe bills, or that, if they had converted them into money, they ſhould account for the money received on them.

The aſſignees objecting that perhaps the petitioners at *Paris* had not paid thoſe bills, it was ordered to ſtand over to have that fact cleared. Affidavits to that purpoſe were now read.

For the petitioners it was now inſiſted, that thoſe bills, which remained in ſpecie at the time of the bankruptcy, and were ſent over to be appropriated to a particular purpoſe, which could not now be anſwered, ſhould be conſidered as the property of the drawers, who had paid them on their coming back, and not as caſh in the ſhop or as blended with the bankrupt's eſtate and become part of their property, ſo as that the petitioners ſhould be only as common creditors. *Julian* and Co. being all along indebted to *Dumas* and Co. theſe bills remitted to them are only authorities to them to receive ſo much money on account of *Dumas* and Co. which they may negotiate for valuable conſideration: but receiving them only for a particular uſe as agents or truſtees, that uſe being abſolutely at an end, the authority is revoked thereby; ſo that if upon theſe bills becoming due the *Julians* had received the money on them, it would not be on their own account, but money had and received to uſe of the drawer; and then the aſſignees, if they have converted them, can only ſtand in place of the bankrupt. This court, and courts of law go as far as they can in caſes of bankruptcy to follow the property. If goods can be traced, before the property is converted, the original owner ſhall have them, notwithſtanding they were conſigned to a factor, who might have ſold them. So in other things liens are allowed in that caſe. *Trover* might have been maintained for theſe bills upon ſhewing the particular circumſtances, and that the property was then remaining in *Dumas* and Co. Theſe bills therefore muſt be conſidered diſtinct and ſeparate from thoſe which had been negotiated by the bankrupt in his time; the money received upon which cannot be purſued, as being changed into the property of the bankrupt, and veſted in his aſſignees.

In order to narrow this, *Lord Chancellor* ſaid, it might be a very extenſive queſtion, whether the property of theſe bills in point of law remained in the petitioners, ſo that they might maintain *Trover* at law. They were all made payable to *Julian* or order; and then he doubted no action of *Trover* could be maintained; for

the property of the paper will follow the *choſe* in action: but it would be ſufficient, if they could be made truſtees for the petitioners; and ſuppoſe they had remitted over goods, would it not come to the ſame caſe?

For the aſſignees. There is no ſpecifick lien upon theſe bills: they were part of the general eſtate of the bankrupt; who cannot be conſidered as a truſtee, but as acting in general as a merchant, and theſe as general remittances, and not appropriated to a ſpecial purpoſe; for though to be placed to the account G, meaning (as it is inſiſted) the houſe at *Cadiz*, that is in fact to the uſe of their houſe at *Paris:* for the houſe at *Cadiz* was their own and belonging to the ſame partnerſhip; ſo that it cannot be ſaid to be on account of another houſe, but accepted to the uſe of the partnerſhip in the general account between them. Then the ſpecial circumſtances of the caſe not ſhewing any truſt, it is within the ordinary courſe of negociating bills of exchange, and comes to the general queſtion, whether ſuch bills, remitted and indorſed to *Julian* or order, (by which the property is veſted) and remaing unnegotiated, are to be conſidered on the ſame foot as goods undiſpoſed of in the hands of a factor (which are held to be the property of the merchant who ſent them over) or as caſh? This is a queſtion of great conſequence to trade in general. No authority is produced, where they have been conſidered otherwiſe than as caſh in the hands of thoſe, to whom they come; as from their nature and the conſequences they ſeem to be. In general they are of the nature of caſh; are diſcounted with bankers ſoon after their coming to hand, and are conſidered as part of their ſubſtance or ſtock; as they have credit in proportion. Theſe bills might have been negotiated immediately before or after the day of payment at diſcretion. The remitters themſelves muſt have conſidered them ſo; as otherwiſe they could not anſwer the purpoſes for which they were remitted; which was to enable the *Julians* to pay other bills, which would become due ſooner. Beſide there was an actual treaty not long before the bankruptcy was entered into for the aſſignment of theſe bills in truſt to pay the bankrupt's creditors; which aſſignment is an appropriation of them, independent of the firſt queſtion whether they were caſh or no. But it will depend on the taking the general account, in which the amount of theſe bills muſt as caſh be conſidered as an *item*, and applied as the balance ſhall appear; which there is reaſon to think, will turn out in favour of the bankrupt againſt the petitioners on the general account; and which ought to be ſet againſt the balance on the particular account.

LORD

LORD CHANCELLOR.

This appears a very plain caſe to intitle the petitioners to theſe bills remaining unnegotiated, amounting to 580*l.* It is true, it is a queſtion (if a queſtion at all) of great conſequence; and that may be ſaid either way: but I think, it is of the greater conſequence the other way, and turns againſt thoſe, who urge that: that is, that one man's property, whether a chattel in poſſeſſion or a *choſe in action*, may not be diſſipated to pay another's debts. It is true, the general end, intent, and view of the laws of bankruptcy is to level all creditors, and that all, which belongs to the bankrupt, may be equally divided among all without regard to ſuperiority in point of law: but that is the bankrupt's eſtate, and therefore whatever is both in law and equity his, is ſo liable in an equitable proportion: but if the ſubject matter of the queſtion is not the bankrupt's eſtate in point of law and equity, eſpecially if not in equity, the conſequence is, that it is not conſidered in the diſtribution as his eſtate, but that the perſon intitled either to the legal intereſt for his own benefit or to the equitable is intitled to have that to himſelf in *ſpecie*: for the aſſignees under the commiſſion take the eſtate of the bankrupt and any legal intereſt in the bankrupt, ſubject to all the ſame equities, as it ſtood in the bankrupt at the time of the bankruptcy: otherwiſe the admiſſion of commiſſions of bankruptcy would be intolerable, for it would ſo change the property as not to be endured. Conſider, how far courts of law and equity have gone. All ſhall be equally divided among the creditors: but if that bankrupt was a factor, and his principal abroad had ſent over to him a parcel of goods by conſignment to him or his order (as theſe bills of exchange are made payable) which come to his poſſeſſion, and he might (if he pleaſed, or if he had an opportunity) have ſold them the next day, and taken the money, in which caſe the party could only come as a general creditor upon his eſtate and taken his dividend, yet notwithſtanding that legal property the factor had in, and power over, them, if they remain in *ſpecie* in his hands, it has been determined over and over, that thoſe goods being in the hands of the factor unchanged ſhall be delivered to the principal, who has a lien upon them as his own property, and the bankrupt only as truſtee and agent for him. And this has been determined contrary to the words of the *Stat.* 21 *J.* 1. which took up ſo much debate in *Ryal* v. *Rowles*, which ſtatute ſays, that all effects in the hands of the bankrupt, or in his controul, power, *&c.* ſhall be divided among the creditors: yet as the buſineſs of a factor is a diſtinct thing, and they were not put into the hands of the factor for a fraudulent purpoſe, that has been conſidered as a caſe out of that act of parliament in order to ſupport the right of the parties, and not to interrupt the courſe of commerce. Even courts of common

Intent of bankrupt laws to level all creditors; but as to the bankrupt's eſtate only; for aſſignees take it ſubject to all equities at the time of bankruptcy.

Factor, to whom goods are conſigned, has a legal property or power, and may ſell, and principal only a general creditor: but if unchanged, has a lien on them, or upon notes taken for them.

Ante, 27 January 1749-50.

law have gone further: there was a caſe not long ago in the *Common Pleas*, in which the factor had ſold the goods, and taken notes for them; it was determined (I believe) that the original owner had a ſpecifick lien upon and was intitled to thoſe notes: though they held, that if the money, which has no ear-mark, had been received, it would be different; ſo far it has been carried in the caſe of a factor. Then conſider the preſent caſe, and the ſtate of the evidence: this is endeavoured to be compared to the caſe of a general tranſaction; but I do not take it ſo, but that theſe bills were drawn to be appropriated to particular purpoſes, not only for that account *letter G.* but to anſwer and reimburſe the *Julians* thoſe bills which they accepted. The account *G.* means the account of the houſe at *Cadiz*; it is ſaid to be the ſame perſon's with the houſe at *Paris*: but I take it not ſo, and there is a diſtinct perſon. The *Julians* never paid thoſe bills, they accepted; conſequently were intitled to no indemnity or reimburſement for them. When thoſe bills drawn on other perſons came into the hands of the *Julians* indorſed, they might have negotiated and diſcounted them, and received the money, which I could not have followed, and would have a right to retain certainly, and did ſo as to part: but as to that part they did not, the queſtion is, what muſt become of them? Now it would be very hard to ſay, that theſe bills ſhould go to be diſtributed among all the creditors under theſe circumſtances. The ground, upon which that is contended for, is, becauſe they are *choſes in action*, and the bankrupt might have diſpoſed of them; and ſo he might. Suppoſe, inſtead of drawing bills on others to reimburſe them, they had remitted a cargo of goods to anſwer that, and they had come to the hands of the *Julians*, and remained undiſpoſed of, the court would conſider the *Julians* barely as truſtees as to thoſe goods, and would have ordered them to be returned, becauſe not ſent to anſwer the general account, but for a particular purpoſe which the *Julians* had not anſwered, and were not damnified; and conſequently they remained in their hands as truſtees for thoſe at *Paris*; and this court is to conſider, as if the legal property was ſtill in the original owner. It is attempted to make a kind of aſſignment of theſe bills ſo as to affect them before the bankruptcy, as diſpoſed of before the bankruptcy: but that muſt be laid out of the caſe, for nothing was done upon it, and therefore no alteration of the property of theſe bills: after the bankruptcy the bills remain in the hands of the aſſignees and in the ſame caſe: the acts of the aſſignees will not alter the rights. It is ſaid, there is reaſon to think, *Dumas* and *Co.* will on the balance of a general account be debtors to the bankrupt; and then that notwithſtanding theſe bills are remitted over to be placed to a particular account, they will conſider that as their account; and therefore if they are creditors on the balance of a general account, the money on theſe bills may be applied to anſwer that, though remitted to a particular purpoſe: but it clearly appears, that *Dumas*

and *Co.* are not debtors on the general account, but that the *Julians* are. However ſuppoſing the contrary, the conſequence would not have been that, which is inferred, that the whole of theſe bills ſhould be conſidered as part of the bankrupt's eſtate; but it ſhould be taken upon the foot of mutual demands upon the act of parliament, and that whatever was ſuch balance, ſhould be deducted, and not deduct the whole. It appearing therefore that *Dumas* and *Co.* have paid and taken up all the bills amounting to 1115 *l.* drawn on the *Julians*, and their acceptance being ſtruck out and diſcharged, and alſo that the aſſignees have ſince the iſſuing the commiſſion of bankruptcy received the money on the remaining bills amounting to 580 *l.* let the aſſignees pay that ſum to the petitioners, or to ſuch perſon as they ſhall appoint.

5 G. 2. On mutual demands the balance only deducted.

Earl of Bath *verſus* Earl of Bradford, *Octob.* 26, 1754. Caſe 207.

LORD *BRADFORD* makes ſeveral leaſes with covenant for quiet enjoyment during the term. By his will he creates a truſt for payment of his debts, *viz.* that the truſtees ſhould by mortgage or ſale of a competent part of the eſtate raiſe ſo much money to pay debts and legacies, as the perſonal eſtate was not ſufficient to ſatisfy.

Intereſt.

The tenants under thoſe leaſes are after his death evicted by the remainder man, and bring actions at law againſt the executors, and recover.

The perſon, to whom a real eſtate was deviſed by the will until the defendant Mr. *Newport* came of age, joins with the truſtees in paying off thoſe debts and taking aſſignments thereof.

The Maſter being directed to compute the debts of the teſtator computes intereſt upon theſe debts: the report is made in 1753. and abſolutely confirmed without exception.

The queſtion now upon petition and exceptions was, whether the defendant Mr. *Newport*, who was a lunatick, and committees appointed, ſhould be let in to take exceptions to the report?

That intereſt ſhould be allowed on theſe demands were cited *Carr* v. *Lady Burlington*, 1 *Will.* 229. and *Maxwell* v. *Wetenhall*, 2 *Will.* 26.

LORD

LORD CHANCELLOR.

Leſſor covenants for quiet enjoyment, and deviſes in truſt to pay debts; leſſee evicted recovers againſt executors, and aſſigns the judgment: it is a debt by ſpecialty, and aſſignee intitled to intereſt.

The firſt queſtion in the natural order of things is, whether there is ſufficient ground for the court to let in the defendant to take exceptions to the report; and this from the circumſtances of his perſon, being a lunatick, and the cuſtody committed under the ſeal of this court; and alſo (for both ingredients muſt concur) by reaſon of injuſtice having been done for want of proper care taken of that perſon? All theſe reaſons muſt concur to induce the court to take ſuch a ſtep; for that muſt be determined before the entering into the merits. This brings it to the queſtion ariſing upon the petition; which queſtion muſt be determined upon the ground of thoſe ingredients, that is, the diſability of Mr. *Newport* to take care of himſelf, and there having been injuſtice by neglect of his intereſt. But though that is ſo in the order of things, it is proper for the court to take into conſideration for the ſaving time, whether or no, if I ſaw ſufficient ground upon the firſt point to give him relief, there would be ſo on the latter point; for if ſubſtantial injuſtice is not done, the court would not give that circuity: and I think, upon conſidering the latter that will prevent entering into the other.

Lunaticks.

I will not enter into the queſtion, whether there is a difference as to a lunatick's or an infant's being concerned. I agree, in conſideration of law and the ſtrict rules of the court, there is a difference: but as to the diſcretionary power of the court to give a liberty of this kind, I know no difference.

Ante, Barwell v. Parker, 22 July 1751. Lloyd v. Williams 1740. This latter is in 2. Atk. 108. † Barnad. Ch. Rep. 224. † See my note ante 364.

As to the two caſes cited at the bar, I doubt, if one of them is conſidered, it is contradictory to the ſtanding proceedings in this court; that is, that where a man creates a general charge by will for payment of all his debts, that ſhall make ſimple contract debts carry intereſt as well as others. I do not ſay, I give an abſolute opinion upon it: but I take it, that ſuch ſimple contract debts ſhall not carry intereſt, unleſs there is a particular ground for the court to ſay ſo.† I think, it would be very miſchievous to lay down ſuch a rule: it would frighten people from doing that juſtice to creditors, by creating that kind of truſt, which an honeſt man ought to do, where he has reaſon to think his perſonal eſtate not ſufficient. I will make ſome obſervations upon thoſe caſes. As to the firſt of them I do not take the opinion of Lord *Harcourt* there to be founded on the general courſe of the court. It is ſaid there *by this truſt term*; and no doubt but a truſt term may be drawn ſo as to induce the court to do it; and, I believe, it was ſo there. What words might be in the clauſe there to induce the court to think it was intended, there ſhould be a compenſation for delay of payment to the ſimple contract creditors as well as the others, I cannot tell: but

On general charge by will to pay debts, ſimple contract debts carry not intereſt.

there is a particular clauſe, giving ground to think there was ſuch. Next as to *Maxwel* v. *Wetenhall*, it is ſo laid down in general in that book: but there are two obſervations to be made. Firſt no ſtate of a caſe is there; and it is always very difficult to apply the reſolutions of a court laid down in that general manner, eſpecially in a court of equity where caſes depend on circumſtances: it may be otherwiſe of a court of law. Another obſervation ariſing upon it is this; I am inclined to think, that aroſe on the maſter's report; and then the queſtion might be only of giving intereſt from the particular time.

But laying theſe two caſes out of the way, I will determine it on the particular circumſtances of the caſe; and upon that I am of opinion, that theſe creditors, that is, the perſons ſtanding in the place of the creditors by paying off the debts, are intitled to have intereſt.

As to that I will conſider it in two lights. Firſt, ſuppoſing Lord *Bradford* had not created any truſt by will for payment of debts, but let his eſtate deſcend to the heir, or made a plain deviſe to a deviſee, which would be void as to creditors by the ſtatute of fraudulent deviſes; and in the next place upon the foot of the truſt.

As to the firſt conſideration what would have been then the caſe? This is not a ſimple contract demand, but a debt, a demand ariſing by ſpecialty, a covenant under hand and ſeal. Taking it againſt the executors, it is a demand by ſpecialty, by covenant. A circumſtance occurs to me, which ſhews, how far the courts go to do this. Supposing a writ of error had been brought in the *Exchequer Chamber* by the executors upon theſe judgments; I am of opinion, intereſt would have been taxed in damages; for it is the courſe of that court, where the rule is to tax intereſt in coſts for delay of execution; and I have done it frequently. That ſhews, it is in the power of courts not only of equity but of law to do it. But to put another caſe, (I am now on a ſuppoſition, that there was no deviſe to break the deſcent, or ſuch a deviſe as before mentioned) ſuppoſe they had brought an action againſt the heir at law, or againſt the heir at law and deviſee jointly: if the heir in caſe of a deſcent, or the heir and deviſee jointly in caſe of a deviſe, had come in and confeſſed real aſſets (which in juſtice they ought to have done) in that caſe there would have been judgment againſt them for the debt to be levied out of the eſtate: but becauſe it could not be known how much the value of the land deſcended is *per annum*, there would be a writ of inquiry to the ſheriff, and then the judgment would have gone on, that the ſheriff ſhould deliver the lands to the plaintiff, *donec debitum prædictum levaverit*: that would have been the judgment. Upon that the ſheriff makes an inquiry in nature of an extent; fixes the extended

Intereſt taxed in damages on error in Exchequer-Chamber.

The judgment againſt heir or heir and deviſee jointly on a deviſe void by 3 & 4 W. & M. cap 14. according to extended value the lands delivered by ſheriff to plaintiff.

No relief in this court according to real value, but on paying intereſt.

tended value, which is always much below the real value of the land, and delivers them to the plaintiff according to that. What remedy would the heir, or the heir and deviſee, have? By *ſcire facias* to have an account and the lands delivered back: a court of law would have done that only according to the extended value by the ſheriff. All, that could have been done, would be to come here to have it extended according to the real value, and to have it back afterward. But upon what terms? Upon paying intereſt; for otherwiſe this court would not have extended their equitable arm to aſſiſt the heir at law or deviſee, but according to equity by making him anſwer ſatisfaction and do juſtice. This ſhews the opinion of the court, what is the juſt and equitable way of proceeding.

Deviſe in truſt to pay debts, is out of the ſtatute of fraudulent deviſes.

But here is a deviſe, that takes it out of the ſtatute of fraudulent deviſes; becauſe it is a deviſe to truſtees, and the firſt truſt is for payment of debts; which takes it out of that: therefore there could be no relief for creditors but by coming into this court; for they could have no action againſt the heir or againſt heir and deviſee jointly. The perſonal eſtate muſt have been firſt applied, whether there had been ſuch words in the truſt or no. Then conſider, whether there is a ground for the court to give intereſt. One thing is plain; that all theſe creditors might have joined in a bill for ſatisfaction of their debts, or all have brought ſeparate bills to have had a performance of this truſt by mortgage or ſale of this eſtate for that purpoſe. Then the court muſt have decreed for the raiſing, by mortgage probably as this is a great eſtate, and conſidering the circumſtances of the perſon; and the moment that mortgage was made, the money it is clear muſt have carried intereſt. Then how is the defendant Mr. *Newport* or his eſtate prejudiced, by what has been done? It has prevented the ſale or mortgage of that eſtate, and ſaved the expence of all thoſe ſeparate bills. Why therefore ſhould not they be conſidered by the court as ſtanding in the place of thoſe creditors, avoiding that circuity? It was objected, that though the court would certainly upon bills brought by the creditors have decreed by raiſing the money by mortgage or ſale, yet the truſtees could not have done it by joining with the perſon, who had this particular chattel intereſt. But I am of opinion, that the truſtees might; for they are not to wait for a decree of this court for the raiſing the money; which would oblige every perſon to come here: whereas they might do it without that, and therefore it has been common tor truſtees to do it fairly by ſale or mortgage, and this court, if it came before them afterward, has always ſupported it. Decrees of this court do not give rights, but are only for an execution of that truſt and power. But it has been further objected, that however that is, the Maſter has no authority to give this intereſt; for that that muſt be upon a ſpecial caſe, laid before the court at

Truſtees to pay debts may fairly raiſe by ſale or mortgage without waiting for a decree.

the hearing, ſo as to intitle to and to pray a direction for intereſt for theſe demands. I think, that would be the more regular method; and it might be an omiſſion, and not attended to. It is generally required, that a ſpecial caſe ſhould be made: but what would be the conſequence of that objection? If it was the right of the parties, they might come at it certainly by a rehearing or ſupplemental bill. Then I am prayed in an extraordinary manner to open this report, which is abſolutely confirmed without exception, and without any objection laid before the Maſter before the making the report, in order to ground any exception, and by reaſon of the diſability and circumſtances of Mr. *Newport* to let him in to that advantage. Ought the court to do it, when they ſee ſubſtantial and material juſtice done? Certainly not upon any point of formality; and the conſequence would be, that Mr. *Newport* or thoſe in his place would not thank the court for it; for it would create a new expence and a new cauſe; then further coſts: and yet the ſame juſtice muſt be done.

I am of opinion therefore, that this petition ought to be diſmiſſed; and I will order the exceptions with a declaration, that in juſtice the aſſignees of thoſe judgment-creditors are intitled to intereſt.

Tomkyns *verſus* Ladbroke, *June* 27, 1755. Caſe 208.

Cuſtom of London. A Freeman on ſame day with his will, by deed aſſigns part of his perſonal eſtate in truſt to ſeparate uſe of his daughter; he was then aged ſeventy-two; in the gout; and died in two days; the daughter had been married without conſent; but he was reconciled. It is a teſtamentary diſpoſition, in fraud of the cuſtom, and may be diſputed by daughter's huſband.

STEPHEN JENKINS a freeman of *London* on the the ſame day executes a will and a deed; by the laſt of which he aſſigns 5000*l.* part of his perſonal eſtate to truſtees to the ſeparate uſe of his daughter, who had married without his conſent, but with whom and alſo with her huſband, it appeared plainly, he had been reconciled: but part of the truſt of this deed was, that ſhe ſhould not have power to give it to her huſband.

At the time of making this diſpoſition he was about ſeventy-two, and afflicted with an aſthmatick gout; and, though he grew ſomewhat better before his death, died in two days after.

The huſband in life of his wife brought this bill to ſet aſide this aſſignment.

LORD CHANCELLOR.

I ſhall not found myſelf in my opinion upon any of the aggravating circumſtances of the cauſe; which, having been forgot in the family, ſhould not be now revived. Nor ſhall I found myſelf upon an opinion of evidence or ſuppoſition of actual fraud; which in fact

fact does not appear to be in the perſons tranſacting this. Nor can I much blame Mr. *Jenkins* himſelf in what, he did; for he looks to have intended a very reaſonable diſpoſition under the circumſtances, provided he had a power to make ſuch a diſpoſition. My opinion therefore, and the decree I ſhall make thereupon, will be founded only on general principles as to the cuſtom of the city; and, as Lord *Cowper* has ſaid, I muſt not make a decree to defeat that cuſtom. In that litigated caſe of *Blunden* v. *Barker* (in which I was of counſel) precedents were mentioned. Firſt *Hall* v. *Lumley* ſo long ago as in 1640. where the court, diſſatisfied with a certificate that had been given in 1635. ſent it to be reconſidered; and thereupon a certificate was made directly contrary to the former, the laſt being, that where there was a compoſition with the wife, the wife's third part ſhould accrue to the whole eſtate, ſhe as to that part being as dead, and that to be divided. More modern caſes are *Hancock* v. *Hancock* in 1710. by Lord *Harcourt* on appeal, and *Rawlinſon* v. *Rawlinſon* in 1714. It is true, there was a certificate in 1704, when Sir *Salathiel Lovel* was recorder: but there the cuſtom had not been found out by him: and therefore it is now a ſettled point as in *Hall* v. *Lumley*, and that upon great conſideration. The marriage here was without conſent; but that muſt be laid out of the caſe, for the daughter muſt be conſidered as a child married with conſent becauſe of the reconciliation.

1 Wil. 634.
2 Ver. 666.
Where wife of a freeman is compounded with, her third accrues to the whole eſtate; and ſhe is conſidered as dead.
2 Ver. 665.

Then the conſiderations are firſt, whether the plaintiff the huſband is a perſon proper to call in queſtion the act done by the father of his wife to defeat, or in fraud of the operation of the cuſtom, as to his own benefit, or whether that is confined to the child? Next, if he is proper, whether the act of the father, the aſſignment of this 5000 *l.* is in fraud of the cuſtom, againſt which he is intitled to be relieved?

As to the firſt I am of opinion, that the huſband of the daughter of a freeman is a perſon proper; and not only the child, but any perſon ſtanding in right of that child (as the huſband does) has that right. Suppoſe the father died without any will, or without doing this act, the huſband would be intitled in right of his wife to his own uſe, to what came to his wife, except that this court would oblige him to make a reaſonable ſettlement; he would undoubtedly, and this upon the cuſtom in right of his wife; it would be inconſiſtent otherwiſe; the huſband has a conſequential right; it ariſes from the cuſtom, contingently at firſt, and veſted in him in right of his wife after the father's death. But it is ſaid to be determined, that a father may advance his daughter by a ſettlement in truſtees for her ſeparate uſe, part of his perſonal eſtate, and that this has been held an advancement of a daughter; and therefore that act by the father in giving this part of his perſonal eſtate to his

Settlement to ſeparate uſe of freeman's daughter an advancement as between the children, and brought into hotchpot:

his daughter for her ſeparate uſe, being an advancement, ſhall bind the huſband; the caſe cited for the defendant of *Cox* v. *Belitha*, 2 *Wil.* 272, is right, that it ſhall be conſidered an advancement for a daughter, that it ſhall be brought into *hotchpot* to prevent fraud between the father of the wife and her huſband to the prejudice of the other children: therefore that does not tend to the point, how far the huſband is intitled to be relieved againſt an act of this kind: it only tends to ſhew, that as between the children themſelves they ſhall be ſo intitled. Another caſe, cited to ſhew that the huſband could not controvert this, was *Merewether* v. *Heſter*, 5 *G.* 1. before Lord *King*; where a freeman gave part of his perſonal eſtate to the ſeparate uſe of his daughter, who was married; the daughter and her huſband both ſurvived the father; and the huſband after the father's death ſuffered the wife to enjoy it to her ſeparate uſe, and died; and his repreſentatives would have called this in queſtion as coming to the wife by virtue of the cuſtom, and the huſband intitled to it, and the ſettlement to her ſeparate uſe void: but the court held otherwiſe, becauſe the huſband let the wife injoy it ſo long: but if the huſband had, as in the preſent caſe, immediately after the father's death called it in queſtion, and inſiſted on his matrimonial right, *non conſtat*, what would have been the determination there. That caſe goes upon this; that where a freeman by will diſpoſes of his whole perſonal eſtate between his wife and children, and after his death the wife has ſubmitted to the will, (not by declaration in writing, but without diſturbing it), and the wife dies, and her repreſentatives bring a bill for an account, inſiſting that the wife was intitled to her ſhare by the cuſtom, and that her huſband's will was void, the court has denied that relief to the repreſentatives of the wife in ſeveral caſes; becauſe her enjoying it under that was an evidence of her aſſent, and upon that principle only, not to diſturb things long acquieſced in in families upon the foot of rights, which thoſe, in whoſe place they ſtand, never called in queſtion. Theſe caſes then being laid out of the way, the general queſtion is, whether the huſband is a proper perſon to call this in queſtion; and if not ſo held, it would deſtroy the whole faith and credit as to the cuſtom of *London*. The very cuſtom ſuppoſes, that that inchoate right (if I may ſo call it) of the child of a freeman is a ground of advancement of marriage. If then that is the general reaſon, and if the father might by a colluſive act veſt that ſhare, which would accrue to the daughter, in truſtees for the ſeparate uſe of the wife, it would deſtroy all faith of that kind. It is true, that notwithſtanding a freeman may in his laſt illneſs lay out his perſonal eſtate in land; that goes upon a ſuppoſition, which the cuſtom does not make: for the cuſtom goes on a contrary ſuppoſition, that a freeman as a trader would not lay out his perſonal eſtate in land. But though that was in the power of the father to have done, it is not to be brought into conſideration. Therefore conſidering the intent

but her huſband may be relieved againſt it, if he does not acquieſce, yet muſt make a reaſonable ſettlement.

Freeman's widow, acquieſcing under his will, bound.

Freeman may in his laſt illneſs lay out perſonal eſtate in land; but the cuſtom goes on a contrary ſuppoſition.

and the matrimonial right of the husband, though it was an act done for the wife, yet if it excludes him, he may take advantage of it. But not only the husband, but the child itself, is concerned; for it tends to give power to the father to tye up and bind it so, that the child itself should not have a right over it; and that appears by the trust in this very case, that she shall not have power to give it to the husband. A father has not that power to bind the property of a child. This might be very unjust and uncharitable; for suppose a husband reduced to distressed circumstances, and the wife reconciled to him, and desirous to make some provision for him, by this deed her hands are tied up from so doing; therefore such a deed as this is what the husband has a right to call in question in this court.

Freeman may on his death-bed by act give away any part of personal estate, if he reserves no power over it: but there must be the clearest evidence of enjoyment under it, or that it is not a testamentary act in fraud of the custom.

The next consideration is, whether there is a ground to call it in question upon the acts, that have been done? Upon this I devest the case of any fraud; and I wish, they had taken it upon the foot, Mr. *Jenkins* meant it: but I think, it appears to be an act in fraud of the custom. It is said, that a freeman may by act in his life and *in extremis* give away any part of his personal estate, provided he devests himself of all property in it: though if he reserves to himself a power over it, that is considered as void. Indeed in general those propositions are right; but then where there is any case of such an act by a father upon his death-bed, and no evidence of actual possession or effect of possession or enjoyment during life of the father, (which could not be here indeed), then the consideration is, what construction ought to be made upon the nature and intent of the act done? It appears to me, that this act of the father was in nature of a testamentary act, done at the same time as he made his will; and therefore must be judged to be an act in fraud of the custom, though not in actual fraud. Then the general question is, how far a freeman is allowed to do this; and to use the words of Lord *Cowper*, If this is allowed, it would defeat the children's customary shares. Here was a man aged seventy-two, had a dangerous and a flattering distemper, had a fit of it then, and thought proper to make a will and a disposition of his affairs, executes a will and a deed both at the same time (as it seems) and dies in two days. This is a case as to the custom of a very suspicious nature. This was not much above a third part of his personal estate; and as to all the testamentary part, he might have told his daughter, that if she insisted on the interest of this 5000 *l.* during his life, he might dispose of that testamentary part to her prejudice: there ought therefore to be the cleerest evidence of an enjoyment under it. It is said, that if the father had lived, the daughter would be intitled immediately to receive the interest of it; but I am of a different opinion: for it is a mere voluntary assignment of an equity, and passes no legal estate. Suppose in the father's life

life the daughter had brought a bill againſt him and the truſtees, to compel payment of the intereſt during his life; and the father had oppoſed it, and ſaid, it was true, he had made ſuch a diſpoſition, but he meant to have the intereſt during his life; the court would not decree it for her, being merely voluntary and *nudum pactum*. Then conſider, upon what tender ground I ſtand; and how hard it is to ſay, this is not an act done in illuſion of the cuſtom; being done under theſe circumſtances, executed together with his will, it is right to conſider it as a teſtamentary act, and that that was the view of the father. It would certainly be ſo in the caſe of creditors: but that is not the preſent caſe, although in ſome caſes the child of a freeman is ſaid to be a creditor: but that is only an analogous expreſſion. As to the caſes cited, firſt from *Dethick* v. *Banks*, 2 *C. Rep.* 48. no inference can be drawn, nor can I tell what to make of it. As to *Hall* v. *Hall*, this comes pretty near to that caſe; for all theſe ſecurities remained in the hands of the father ſtill without being delivered up. Next *Turner* v. *Jennings*, and conſidering the accumulation of reaſons of that decree, one is, that the deed being juſt before the death muſt be conſidered as *donatio cauſa mortis*; ſo is this to be be conſidered, though not ſtrictly ſo; and therefore it is a fraud upon the cuſtom. Upon applying the reaſoning in that caſe to the preſent this has all thoſe particulars, which attended that; which explains the meaning and nature of the act, and is a corroborating evidence together with his not delivering over the ſecurities to the daughter, that he intended to retain the intereſt of it during his life.

2 Ver. 277.

2 Ver. 612.

Then this 5000 *l.* falls into the bulk of the perſonal eſtate; and as to the teſtamentary part muſt go according to his will; as to the other moiety, the cuſtomary part, it belongs to the huſband in right of his wife.

Huſband on acceſſion to wife's fortune muſt make a ſettlement.

But it muſt go to the Maſter to ſee for a proper ſettlement upon her; which has been the general rule. The only objection thereto is, that here are other proviſions for the wife's ſeparate uſe; but that is not a reaſoning, to which I can give way: for there are ſeveral caſes, where there are ſettlements by huſband on wife, and before marriage, yet if a great acceſſion afterward comes, the court will not ſuffer him to exhauſt great part of the wife's property notwithſtanding thoſe other ſettlements before, and much more ſo where there is no proviſion: let the Maſter therefore ſettle it.

In *City* v. *City*, 2 *Lev.* 130. the cuſtom was tried upon an iſſue. I cannot conceive, how that could be: nor do I know what to make of it. *Levinz*, though a good lawyer, was ſometimes a very careleſs reporter.

I make this decree for the ſake of the precedent; for I do not know, if one was to allow of theſe diſpoſitions, how far they might go, though done with a very upright intention.

Caſe 209. Moore *verſus* Moore, *June* 28, 1755.

S. C. shortly reported in Ambl. 279.

Bill of review.

A Decree having been made at the *Rolls* in 1743, but not ſigned and inrolled, a bill of review was brought for matters exiſting before: but no petition to rehear or appeal.

John Moore, nephew and one of the executors of *Charles Moore*, was made party to the former bill as executor, and, as the plaintiffs inſiſted, acted as executor, and ought to be decreed to account in that cauſe for ſo much of the eſtate of teſtator as had come to his hands, it now appearing (which was not then known) that 2500*l.* part of the mortgage-money had come to his hands before the putting in his anſwer in that cauſe. He was not decreed to account, and therefore refuſed to account under that decree; and, that that ought to be now ſet right upon this diſcovery, relief was prayed againſt him as executor named in the will, though he never proved it, (but a power was reſerved to him, when the others proved it, to come in and prove at any time), or as truſtee of part of the perſonal eſtate of teſtator, which he was in the mortgage; and next that he might be called to account as a debtor to the eſtate by having actually received the money (as he now admitted) from the mortgagor before his anſwer in the original cauſe.

In general this demand aroſe from hence; that there were three legacies given by the will of *Charles Moore*, one of 1000*l.* another of 1000*l.* which were to be paid at twenty-one or marriage, and another of 500*l.* by another clauſe and charged on the freehold and copyhold eſtate of teſtator; which copyhold the teſtator ſurrendered to the uſe of his will in 1706; that was preſented in 1723, and by his will deviſed to his grandſon, provided he ſhould pay to his three executors 500*l.* to be paid in two years after his deceaſe; and that the intereſt thereof and of another ſum ſhould be paid to the maintenance and education of the children of *Henry Moore*, and the principal to be divided among them as the executors thought fit.

Two objections were made againſt *John Moore*'s accounting as to theſe ſums: that he was accountable only to the executors, who proved the will, he himſelf never having proved or acted: but if he was to be called to account by the legatees, it was not proper in this way by ſupplemental bill in nature of a

Moor v Moor. 2. Bes. 596.

The bill was brought to have a Legacy of 500 £ charged by Will upon a Copyhold Estate raised & paid to the Plt

The Testor when he surrendred his Copyhold to the use of his will was only Tenant in Tail

He devised the Copyhold to his Grandson charged with the Plts Legacy and also gave his Grandson a Legacy of 1000 £. The Testor for the Father of the Grandson being then living who survived the Testator.

The bill was brought some years after when the Grandson was of Age and in Possession.

It was insisted by the Grandson that the Surrd to the use of the Will did not bar the Estate Tail and that his Father being dead he was entitled as Heir in Possession under the old intail & the change did not affect the Lands.

The Plt insisted. 1. That the Surrd to the use of the Will barred the Estate Tail. 2. But if it did not the Grandson having a Legacy of £1000 must be put to his Election.

Lord Hard: to the last point held he should not for the Case is not within Boys v. Mendent as the Estate Tail descended to the Dofts Father upon the death of the Testator and the Dofts was not Owner of the Estate Tail at the Time. It descended to his Father who might bar him. But because he has not barred him, shall he be put to his Election when he had no Option at the Time.

White v. White.

bill of review with new matter; but only by original bill charging him with colluding with the executors to defraud, or that the executors were inſolvent and that it was not proper to let the eſtate come to their hands. The only foundation to decree him to account as executor is meddling in the adminiſtration of aſſets, of which here is no averment. If an action lays againſt an executor, who pleads a co-executor, and does not aver he adminiſtered, plaintiff may demur. A debtor happening to be made executor, and refuſing to act, was not charged as executor but as debtor: though upon a ſpecial caſe charged and proved of inſolvency of executor and colluſion, the debtor will be decreed to account originally. If he is then to account as debtor to the eſtate, he muſt have allowance for payments by him to the executor; and if they are good payments, his being named executor does not charge him with adminiſtering. The executor might ſue him; and then he may pay without ſuit. The executor is the proper perſon to receive. If ſeveral truſtees join in a receipt, and one actually receives, he only is liable in accounting. As to executors it is to a certain extent different between creditors and executors; both joining in receipt, or one receiving and paying over to the other, both are liable in point of law, and therefore liable here; becauſe courts of equity found the rule eſtabliſhed at law, where courts of law had concurrent juriſdiction, and therefore could not vary it: but in accounting between them and legatees or perſons intitled under the ſtatute of diſtribution, they can only account in this court, and are conſidered merely as truſtees. 1 *Wil.* 241. 1 *Sal.* 318. He muſt then have ſuch allowances, and account in the capacity he was originally liable to the teſtator, as his truſtee or debtor, not as executor.

Next as to the 500 *l.* whether the plaintiffs could affect the copyhold eſtate therewith in equity; both the mortgagee and the grandſon, owner of the equity of redemption, inſiſting that the teſtator was only tenant in tail of this copyhold, which could not be barred by ſurrender to the uſe of the will; eſpecially as that ſurrender was not well preſented; for not being preſented until ſeveral years afterward, ſeveral courts intervened, and ſo it was not at the next court. But ſuppoſing it not intailed, or the intail barred, yet the eſtate has borne its burthen in this cauſe, conſequently there is no ground to affect it; for that *Thomas Moore*, one of the executors, entered on the lands, poſſeſſed them ſeveral years, received the rents and profits, and became inſolvent.

LORD CHANCELLOR.

This is not a proper bill of review, but is brought upon the foundation of that order I made *Oct.* 17, 1745. Though a bill

Improper bills of review put under the like reſtraint as th

others: but there must be petition to rehear or appeal.

a bill of review could not be brought upon a decree ſigned and inrolled for new and ſupplemental matter in being at the time of making the decree, but diſcovered and come to knowledge afterward, without leave of the court and making depoſit of 50*l.* yet, if the decree had not been ſigned and inrolled, they had got into a way of ſupplemental bills in nature of a bill of review at large without depoſit or leave of the court at all, and then brought a petition to rehear or appeal. This was growing into abuſe; and ſeveral of them were brought for vexation. To put theſe improper bills of review under the like reſtraint as the other, was that order: but then it is abſolutely neceſſary to have a petition to rehear or appeal to bring the former properly before the court. Here is a ſupplemental bill in nature of a bill of review with leave of the court before the decree was ſigned and inrolled, upon making ſuch depoſit as is required; but without any petition to rehear or appeal; which I muſt have, before I can enter into it or make a variation. One reaſon of making that order was, that men were at a great expence obliged to ſign and inrol; which was abſurd. But here is more than matter of form: there is matter of ſubſtance. The rule upon a ſtrict and proper bill of review is, that the decree can be varied only upon ſuch errors as are complained of, whether errors on the face or errors of injuſtice, upon this new matter on the real merits of the caſe; unleſs any conſequential matter ariſes; for if there is a conſequential direction, the juſtice of which depends entirely upon the variation made; the court may vary that conſequential direction in favour of juſtice; and that is the practice in the *Houſe of Lords*, who will vary a decree in favour of the reſpondent in any matter conſequential to the relief they give to the appellant. It is the ſame on a bill in nature of a bill of review: but that is not ſo at the *Rolls*. If there had been a petition of appeal, that cauſe would be intirely open: but the cauſe ſhall not go off for that, but before I pronounce my decree, they may prefer ſuch a petition.

July 8, 1755, *His Lordſhip* pronounced his decree.

This cauſe ſtood over not ſo much for doubt (unleſs as to a particular point) as to make the proceedings regular; that is, that a petition of appeal might be preferred; which has been done; and the decree now muſt be all taken as of this day.

The matter before the court is upon a new bill, partly ſupplemental in nature of a bill of review with new matter ſaid to be exiſting at the time of the former decree and diſcovered ſince, and partly original as againſt the Mortgagee, and on petition of appeal from the *Rolls*; all of which are diſtinct.

Firſt

Account.

Truſtee and executor not proving the will, but receiving truſt money, may be called to account, but not as executor; and have proper allowances before the Maſter. The executor or adminiſtrator is the proper perſon to call him to account, which is a diſcharge as to him.

Firſt to conſider the relief prayed by the ſupplemental bill againſt the nephew, who is ſeveral ways attempted to be called to account; and certainly in ſome ſhape the plaintiffs are intitled to have this part of the perſonal eſtate of the teſtator applied according to the will. I am of opinion, that neither of the objections made is a ſufficient anſwer againſt his being called to account. I do not go upon this ground in directing an account againſt him, his being a truſtee of part of the perſonal eſtate, and the truſt-money coming to his hands after the teſtator's death, which makes him debtor to the eſtate; that that is ſufficient to call him to account as executor, or that he is for that reaſon to be conſidered at law or in this court as acting as executor; for then every man happening to be truſtee in a mortgage, or truſtee as to part of the perſonal eſtate, and happening to be named executor in the will, will not be able to diſcharge himſelf from it: that would be carrying it much too far. Nor do I lay it down as a general ground, that every one truſtee of part of the perſonal eſtate of the teſtator, may in that reſpect only be called to account by a particular pecuniary legatee; for that would be carrying it too far. Such truſtee is proper to be called to account by executor or adminiſtrator; which is a diſcharge as to him, if he fairly accounts; and he is not liable to every creditor or legatee. But yet this caſe is under very particular circumſtances; that when made executor, he never renounced, but the other two executors proved the will; he was made a defendant by thoſe legatees to have a general account of the perſonal eſtate; and he now admits by his anſwer, that before he put in the original anſwer, he received this whole 2500*l.* and the intereſt due on it upon the mortgage. I think he ought to have diſcloſed that by his anſwer; he ſhould have gone on, as he does now, that he had received that part of the teſtator's perſonal eſtate. If he had, the court would have decreed him to account for that part come to his hands; for when an account is decreed, where there are ſeveral parties in different rights, all having received, are according to the common courſe of the court decreed to account, though not named executors or in that right. But on another ground, if this matter had been diſcloſed, he ſhould be then decreed to account, that he was debtor to the eſtate and named executor in the will, which is a releaſe of the debt; and this whether he proves the will or not; for his co-executors cannot ſue him, or have an action at law againſt him for this demand; it is extinguiſhed by making him one of his repreſentatives; and if it ſhould be ſaid, that the other executors might ſue him at law, as he does not prove they may, but he might come in when he would, becauſe of the power reſerved to him to come in and prove at any time: therefore if this ſpecial matter had then appeared, I am of opinion, that he was proper

to be called to account. The next conſideration is, whether it is proper by bill of review in this way or by original bill? I am of opinion, it is proper by bill of review; for if this matter now charged and ſhewn againſt him did exiſt at that time (as it did) and if upon the other head it would have been a ground to have directed him to account in that cauſe, had it then appeared, the conſequence is, that he is liable to be directed to account on this bill in nature of a bill of review with this new matter, which exiſted then, and has been ſince diſcovered. The only queſtion is in what ſhape; whether to be charged with all this money and intereſt, or to have the allowances he claims of ſums paid by him to the acting executors. This is not ſufficiently ripe for me to determine; becauſe the circumſtances of it do not appear; theſe allowances will be proper before the Maſter; for under certain circumſtances he may be allowed, under others not. It is true, that he, ſtanding truſtee in this mortgage for *Charles Moore*, owner of the ſurplus of the mortgage-money, might have paid to the teſtator part of this original money, and would then ſtand in place of teſtator as to ſo much, as he paid off; and if done to the teſtator, it could not be objected to: but it is different, when he pays it to the executor; for any circumſtances that might make a *devaſtavit*, and the executor becoming inſolvent, might vary the determination: ſo payment to the executor ſhould go to ſink the intereſt before the principal, though paid otherwiſe by him. But all that is proper before the Maſter, and I will reſerve the conſideration of intereſt and coſts until that account is taken.

Appeal.

Whether reſiduary legatees paid by executor ſhall refund to legatees who were not to be paid immediately.

Another matter ariſes on the words of the former decree, and is now properly before me on the appeal (as the decree at the *Rolls* is not ſigned and inrolled) which is an error complained of in diſmiſſing the bill with coſts as to the account prayed of the ſurplus of teſtator's perſonal eſtate. I own, I cannot conceive, how that came to be directed, when the next clauſe directs a general account of the perſonal eſtate; and that part of the decree muſt be reverſed to make it conſiſtent. The conſideration is, how far there is a right to call on the reſiduary legatees to pay back money, they have received as to the ſurplus from the executors on account of the perſonal eſtate? That is hard after ſuch a length of time and no proof of fraud. I do not doubt, but that might be done as to debts: but here is ſomething particular in this caſe; all theſe three legacies were to remain in the hands of the executors, and not then to be paid. Were the reſiduary legatees neceſſarily to wait, until all theſe particular legacies became payable, before they received a voluntary payment from the executors? It is hard to ſay that: the teſtator has truſted the executors with this money in their hands, they have not.

Copyhold.

Intail of copyhold barred by ſurrender though to uſe of the will only, where no inſtance of barring by recovery.

To ſhew a cuſtomary eſtate tail it is neceſſary to ſhew remainders over, or long enjoyment, ſo as to exclude a fee ſimple conditional.

Next comes the point as to the 500*l.* with which it is inſiſted, this copyhold is chargeable, which muſt be conſidered as to the mortgagee and as to the grandſon owner of the equity of redemption; it is to extend this decree for the ſale of the copyhold, and to apply the money ariſing by ſale, and that the mortgagee may join therein as having taken his mortgage with notice, *&c.* The queſtion is, whether the plaintiffs can affect this in equity? I am of opinion, there is no ground in a court of equity to affect the mortgagee, but ſufficient to affect the owner of the equity of redemption. As to the great objection made to this; that there was in fact an intail of this is plain: but as to the cuſtom for creating an intail in this manor, that is not made clearly to my ſatisfaction. All the books ſay (except thoſe which go on the particular notion, that copyhold eſtates may be ſurrendered in fee *vel aliter*, *&c.*) that it takes in all kind of eſtates, leſſer as well as greater. But that is not ſatisfactory; for it is hard to ſay, that will take in a particular kind of eſtates under the *ſtat. Weſtminſt.* 2. formed and created only by that ſtatute; it is ſtrong to ſay that: though there are caſes, that go ſo far. Others ſay, that before the *ſtat. de donis* there might be a cuſtom to create eſtates tail in manors; for that what was done by the ſtatute, might be by the cuſtom: but then that is a particular cuſtom not ariſing out of the general cuſtom of tenures capable of being ſurrendered in fee *vel aliter*, *&c.* All the books upon this ſay, that it is not ſufficient to ſhew, that lands have been granted to men and the heirs of their bodies; but to ſhew that by cuſtom an eſtate tail might be created, you muſt ſhew, that there have been ſurrenders in tail with remainders over, (for otherwiſe that may be a fee ſimple conditional) or that the lands had been enjoyed for ſuch a length of time, have gone ſo long in a courſe of deſcent according to the limitation, as to exclude the ſuppoſition of a fee ſimple conditional. Nothing of this is proved: but ſuppoſing there was, here is a ſurrender to the uſe of the will, and that is inſiſted to be ſufficient to bar it. I think that eſtates tail in this manor may be barred by a good ſurrender; for upon this point, concerning which there is a ſurpriſing variety and diverſity of opinion, I have always thought, that where there is a manor, in which copyhold might be intailed, either by ſpecial cuſtom or by that general doctrine of a ſurrender in fee *vel aliter*, *&c.* if a cuſtom did not appear to bar by recovery in that manor, they might be barred by ſurrender; becauſe otherwiſe it would create a perpetuity, and make eſtates unbarrable; and that was the opinion of Lord *Cowper* in *White* v. *Thornborough*, 2 *Ver.* 705; and there have been caſes at law that way; and ſo are the modern caſes: though the old caſes are both ways, and, I believe, moſt of them the other way. But here is another point, that this is a ſur-

a ſurrender only by tenant in tail to the uſe of the will, and therefore ſuppoſing a common ſurrender parting with the eſtate could do it, yet this parting with nothing until death, here the deſcent in tail ſhall be preferred. This came in queſtion in *C. B. Paſ.* 1750, in *Carr* v. *Singer*; where three judges againſt *Willes* C. J. held, that a ſurrender to the uſe of a will was ſufficient to bar the eſtate tail. They firſt held, that a common ſurrender would bar the intail of copyhold; for there was no cuſtom of barring by recovery; and next that a ſurrender to uſe of a will would. There *Iſaac Singer* died in 1746, without iſſue, ſeiſed of the copyhold premiſes as tenant in tail general by virtue of an intail created by his father to himſelf and the heirs of his body upon his wife. The ſon had ſix ſiſters, one of which was leſſor of the plaintiff. There was a cuſtom admitted for intailing lands. In 1746 the ſon was admitted to hold to him and his heirs in tail; ſo that he was admitted in tail *ſecundum formam doni*; and, at the ſame time he was admitted, ſurrendered thoſe premiſes to ſuch uſe or uſes, as he by deed in writing or will in writing ſhould direct, limit, or appoint according to the cuſtom. He declared only by his will; and deviſed the copyhold in queſtion to one of his ſiſters, paying 50*l.* apiece to the reſt; "but if I have no "power to deviſe and diſpoſe of this eſtate, I revoke thoſe le-"gacies of 50*l.*" which ſhews, he doubted his power to do ſo. One inſtance was found of a ſurrender to bar an eſtate tail; but under that ſurrender it did not appear, what had been the enjoyment: that therefore was nothing; and it was found in the cauſe, that there was no inſtance in the manor of a common recovery barring eſtates tail. So it is here; and the queſtion there was, whether the intail created by the father is or is not barred by the ſurrender by the ſon and his deviſe. The judgment was, that the ſurrender to uſe of the will did well bar the eſtate tail. This goes a great way; and upon this foot only I ſhould be fully of opinion, that by the ſurrender to the uſe of the will the eſtate tail was well barred; and if one was to examine it, (which there is no occaſion to do, as there are theſe authorities) there is a ſtrong argument for it; for a ſurrender to the uſe of any other perſon paſſes the eſtate; and ſo it is in a ſurrender to the uſe of the will: for the eſtate paſſes by the ſurrender, and then comes within the ſame reaſoning. But another objection is, that this ſurrender is not well preſented. By the general cuſtom of copyholds a ſurrender ought to be preſented at the next court, as appears from Lord *Coke:* but by the ſpecial cuſtom of a manor it may be preſented at any ſubſequent court. What is the cuſtom here, does not appear: that is not a ground for me to determine that the ſurrender is void. Therefore after all that has paſſed, and this uncertainty, this is a reaſon, why I ſhould not give relief againſt the

Surrender by general cuſtom of copyholds to be preſented at next court: but may by ſpecial cuſtom be preſented at a ſubſequent.

3 See 2. Com. Dig. 386. & ant. 302. & Gilb. Ten. ed. by Walk. 270. & A A Dr

the mortgagee upon this point; and it is greatly ſtrengthened by the other point, that this land had borne its burthen. *Thomas Moore* was truſtee in poſſeſſion, and receiving the rents and profits, if he receives ſufficient to anſwer the charge, in general caſes the land is diſburthened; for you ought to have looked out, and muſt reſort to the truſtee and compelled him to execute the truſt; and then ſhall not come againſt the land again. This mortgagee ſaw the truſtee all the time in poſſeſſion, and therefore had reaſon to think the eſtate had borne its burthen; this is therefore a corroborating reaſon not to affect him; nor will I at this diſtance of time direct a trial. As to the owner of the equity of redemption it is true, that theſe points might concern him as well as the mortgagee; and another point has been mentioned, that might concern him, that he has a legacy by the will, and ſhould be put to his election: but that is out of the caſe, for unleſs he had his legacy, I ſhould not put to election. If a man intitled to an eſtate not well deviſed from him by will, but by the ſame will has a legacy given him, and a power in the will to a truſtee for him during his minority; it is paid to the truſtee; but if he loſes that legacy by failure of that truſtee, and receives no ſatisfaction for it, I will never carry that rule in *Noys* v. *Mordaunt* to that extent, as to put him to make his election merely becauſe the truſtee received that legacy for him during his minority. But it is not within *Noys* v. *Mordaunt*, for he was not owner at the time: the eſtate tail deſcended to his father, who might bar him; but, becauſe he has not barred, ſhall you be put to your election, when you had not that option at the time? But he has ſubmitted to ſell, and does not complain of it; and therefore there is no ground to enter into that point as to him; but as to the doubtful point as to the ſurrender it is juſt as to him, that the decree ſhould ſtand as to the ſurplus of the money. As to the other point he defends himſelf by, that his eſtate has borne its burthen; there is no ground for that, although the mortgagee might ſay ſo; as to whoſe mortgage there is no ground to relieve: but the defendant the grandſon, as to the ſurplus, is liable to anſwer the principal and intereſt, that ſhall be found due for the legacy of 500*l.*

Truſtee in poſſeſſion becoming inſolvent, mortgagee may ſay, the land has born its burthen, and is not affected: otherwiſe as to the owner of the equity of redemption; who is not however put to election by a legacy received by ſaid truſtee and never paid to him.

Carr on Demiſe of Dagwel *verſus* Singer, *May* 25, 1750.

Caſe 210.

This caſe is cited in the foregoing.

In *C. B.*

EJECTMENT. Verdict for defendant as to part, and for plaintiff as to part. The verdict for the plaintiff was the ſubject for the opinion of the court.

Iſaac

Intail of copyhold barred by ſurrender to uſe of will, where no cuſtom by recovery or ſurrender. By three judges againſt Willes Ch. J. who thought it might be by recovery without a cuſtom, and therefore not by ſurrender.

Iſaac Singer died *Oct.* 30, 1746, without iſſue, ſeiſed of the premiſes in copyhold as tenant in tail by an intail created by his father to the heirs of the body of the father on the body of his wife. The father, beſide *J. S.* left ſix daughters, whereof the wife of the leſſor of the plaintiff was one. A cuſtom was found in this manor for intailing copyhold lands. *J. S.* the ſon was admitted into the premiſes to hold to him and his heirs in tail according to the cuſtom; and he ſurrendered into the hands of the lord to ſuch uſes, as he ſhould by any deed under hand and ſeal atteſted by witneſſes or by laſt will or writing ſo atteſted limit or appoint. He made his will deviſing the cuſtomary meſſuages and premiſes in queſtion, which he had ſurrendered to the uſe of his will, to one of the defendants. Upon the rolls of the manor there was found one ſingle inſtance of a ſurrender to bar an eſtate tail; but it did not appear, what enjoyment was under that ſurrender: and no inſtance was found on the rolls of a recovery ſuffered to bar eſtates tail.

See 1. Wilſ. 26. Bree. in Chane. 429. 2. Vern. 585. 2. Burr. 976. Ver. 944.

See also W. Lee's note in 3. P. Wms 10. And 2. Blackſt. Rep.

The caſe having been twice argued, the court taking time to conſider now delivered their opinions.

Birch, J.

The queſtion is, whether the eſtate tail, created by the father, is or is not barred by the ſurrender by the ſon and the deviſe in purſuance thereof. As it is admitted, there is a cuſtom in this manor for intailing copyhold lands, it muſt be admitted, there is ſome method to bar ſuch intails; or elſe there would be a perpetuity, which the law abhors: and I think, this ſurrender is a good bar to this intail. Three methods of barring were mentioned. Firſt, by recovery in the Lord's Court. Secondly, by ſurrender. Thirdly, by forfeiture, and re-grant; of which laſt kind inſtances are found in 2 *San.* 422. 2 *Keb.* 127. 1 *Sid.* 314. *Sti.* 452. but all thoſe caſes are reſtrained to the manor of *Wakefield* in *Yorkſhire:* therefore this method of barring may be laid out of the caſe. As to the recovery it muſt be agreed, that 1 *Roll. Ab.* 506. *B.* 2. tenancy in tail of copyhold may be barred by common recovery without cuſtom. *Mo.* 637. by ſpecial cuſtom. *Cr. E.* 380, 391. otherwiſe, and for a conſiderable time theſe recoveries ſeem to be looked on as diſcontinuances only, few antient caſes going ſo far as to hold them to be bars without ſpecial cuſtom. In *Snow* v. *Cutler*, *Ra.* 162. it was held by *Keeling* and *Twiſden*, the recovery of copyhold doth not dock the remainder without cuſtom. So 1 *Lev.* 136; where all the judges agreed, that if it was an executory deviſe, it was not barred by recovery according to *Pell* v. *Brown*; much leſs in caſe of copyhold

hold which is not barred without cuſtom. Comparing together theſe caſes and others in *Dan.* 192. the effect of a recovery without cuſtom upon eſtates tail is plain, and is out of the preſent caſe; and conſequently the ſurrender muſt take place. This is the only method of barring copyhold intails remaining to be conſidered; and it ſeems the eaſieſt and moſt natural way; a ſurrender ſeeming the foundation of copyholds. But it is ſaid, that a ſurrender without a cuſtom is no bar, according to *Co. Lit.* 60 *B.* Suppoſing a recovery without a cuſtom works not a bar according to *Snow* v. *Cutler*, and can only make a diſcontinuance, a ſurrender muſt be a bar. But there has been one inſtance in this manor, which has a tendency toward a cuſtom; becauſe a cuſtom begins firſt by a ſingle inſtance, as in the caſe of a carrier, and is often taken in a reſtrained ſenſe, not neceſſarily importing time out of mind. In *Cr. E.* 484. ſurrender by tenant in tail of a copyhold makes a diſcontinuance. Indeed it is difficult to reconcile the caſes on this head in the ſame book. In 148 ſurrender is held no diſcontinuance without cuſtom: but that ſeems wrong, for ſurrender by cuſtom is admitted to be a bar by the cuſtom; therefore one would think, that according to 484 it muſt be a diſcontinuance without cuſtom. In 2 *Ver.* 583. and in 702. Lord *Cowper*'s opinion is that where there is no recovery by cuſtom, a common ſurrender will bar the intail. But it is objected, that though in ſome caſes a ſurrender might bar a copyhold eſtate tail, yet this ſurrender to uſe of the will ſhall not; becauſe it paſſes nothing; and he might do what he would with it. This is indeed like all other caſes depending on wills, that nothing at the time of making paſſes; no immediate intereſt until death of teſtator: but if not prevented by any intermediate act, the intereſt certainly paſſes at his death: and there is no caſe making a diſtinction between a ſurrender taking effect immediately and further taking effect at the death. Wherever there is a cuſtom to ſurrender, which will bar an eſtate tail, it is always held, that a ſurrender to uſe of the will will bar the intail alſo. There are therefore but few caſes, where a recovery without a cuſtom is held a bar. Even in 1 *Roll. Ab.* there is a *Dubitatur*. In many caſes in *Cr. E.* ſuch recovery is held only a diſcontinuance. In 2 *Ver.* a common ſurrender will do, where there is no particular method in the Lord's Court; and a recovery without a cuſtom is of no force; and as in this caſe it appears, there is no ſuch cuſtom, and in fact no recovery at all, the conſequence is, that a ſurrender will bar the intail, of which there is one inſtance. It is proper to eſtabliſh this method by ſurrender; and the rather as *Chancery* has a concurrent juriſdiction with all courts in theſe caſes, frequently conſidering how far a ſurrender ſhould be ſupplied, *&c.* This method alſo tends to the ſecurity

and the quieting the title and poſſeſſion of the copyholder: but a recovery, if examined into, would be found very inconvenient in ſome reſpects, as in 1 *Ver.* 368. in this method it is hardly poſſible to miſtake. The verdict therefore for the plaintiff ought to be ſet aſide.

Burnet, J.

I muſt concur in that opinion. The whole of the caſe comes to this. Here is a manor, in which cuſtom has eſtabliſhed the intailing of copyhold, and no method of barring; for one inſtance ſo modern will not weigh with me; and an inſtrument without enjoyment is not an inſtrument. I will conſider it in the light, it was at the bar. Firſt whether recovery without cuſtom to warrant it will bar? Next whether ſurrender without cuſtom will? Laſtly ſuppoſing a ſurrender will, whether this kind of ſurrender will have that operation? But it is neceſſary to premiſe, what will not be diſputed, that neither the cuſtom nor the *ſtat. de donis* alone will eſtabliſh it, but both muſt co-operate, and will then produce a regular intail of copyhold; for which might be cited *Co. Lit.* 60. *B.* and 3 *Co.* 8. for it was once *vexata quæſtio*. Next it will be admitted, that a cuſtom intailing will be void, if there is no method of barring; and therefore the law will introduce a method of unfettering that eſtate: nor can an eſtate tail be granted on condition not to bar it. *Co. Lit.* 224. 1 *Ven.* 322. It was contended, that as this ſurrender was to take place *ex neceſſitate*, there might be intended a way by forfeiture and regrant; which not being ſtated in the caſe, the court will never doubt of what is not ſubmitted to it: but if we were to enter into that, there would be a great deal of doubt as to the validity of that cuſtom: and it is certain, that all the caſes thereof relate to a particular manor. That, which is ſubmitted to the court, is, without a cuſtom which is the proper way, recovery or ſurrender. To conſider therefore the firſt point: there are two books, for which I have great eſteem, where it is laid down rather as an opinion than a reſolution, that ſuch a recovery would bar. In *Kitchin* 176 and 178, it is his reaſoning and delivering his own opinion, not the determination of any court. 1 *Roll. Ab.* 506. goes further: he ſeems to chalk out ſome method, he thought would do it, and mentions a *dubitatur*. That caſe was before *Rolle*'s time, and does not depend on his own collection, but muſt be ſome note, he received; and in the next term 44 and 45 *Eliz.* the ſame court did not look on *Morris*'s caſe as a reſolved caſe. But the opinion of *Kitchin* and of *Rolle*, if it ſtands, muſt ſtand, on what is in *Lit. ſec.* 76. that plaints in nature of a real action may be in the Lord's Court: but it will not

not therefore be certain, that a warranty could be annexed to ſuch an eſtate, and conſequently that there can be voucher and recompence in value, which is the foundation of barring in common law courts. If no warranty could be annexed, it can only work a diſcontinuance, which will not avoid a perpetuity; becauſe there may be a re-continuance of the eſtate-tail; and this point is doubted by ſeveral authorities. The remedies of parliament were not of ſuch eaſy acceſs as of late years. The neceſſity of a trading country making the *ſtat. de donis* a general inconvenience with relation to the power of not alienating, the courts here introduced a compleat remedy, the legiſlature an inadequate one, not perfect as to the remainders, though abſolutely good as to the iſſue in tail. The courts here built feigned recoveries upon the foundation of real recoveries in real actions; and it ſeemed hard, that leſſer people ſhould not have the ſame power of transferring their eſtates of copyhold (which was only a baſe fee originally) as the greater had. In proceſs of time, when common recoveries were confirmed and moſt favoured, there were ſome manors, in which cuſtom had introduced a new method of barring; which was the occaſion of a litigated queſtion in the time of K. *H.* 8. and purſued in the time of Q. *Eliz.* The firſt caſe was 27 *H.* 8. *Bro. Tit. Recovery in value, Pl.* 27. In *Dy.* 373. the court inclined, that a recovery in court of *antient demeſne* would work a diſcontinuance. Then comes *Dell* v. *Higden*; which is the firſt caſe, where *dubitatur*. In *Mo.* 358. it is miſtaken; for he gives it as a bar: whereas in *Cr. E.* 372. *adjornatur*. In *Co. Entries* 206 is the whole of that caſe; and *Coke* ſays, he looks on it only to work a diſcontinuance. 1 *Roll. Ab.* 634 ſays, *Coke* was miſtaken, for that it is rather a bar, upon the ſtrength of *Morris*'s caſe. *Cr. E.* 380. the court agreed, it was a diſcontinuance: but not whether it was a bar or no. *Cr. E.* 391. held it a diſcontinuance, but that it could not work a bar. In *Cr. El.* 907. this would not have been reckoned, as a point of doubt, if the court were conſcious of ſuch a judgment in *Morris*'s caſe juſt before. In *Mo.* 753. there is a *dictum:* but it might as well have been ſaid, whether a grant of tenant in tail would work a diſcontinuance, for undoubtedly a ſurrender could paſs nothing, but what the tenant could convey, and could no more work a wrong, than where a thing paſſes by grant. It is there ſaid indeed, there might be a recovery in the Lord's Court, which will bar the intail, but not whether there was a cuſtom for it; for I admit, it might be, if there was ſuch a cuſtom. *Cr. E.* 391. being directly contrary to *Morris*'s caſe, ſo ſhortly mentioned in *Rolle*, and *Cr. E.* 907. being the next year to *Morris*'s caſe, it ſeems to ſtand on the old books *vexata quæſtio*, of which there are great opinions either way; *Kitchin* and *Rolle* againſt *Croke* and *Coke* and later

later authorities; the firſt of which is *Cr. C.* 42. which was the only caſe, where that point came under conſideration of the court; the next is *Snow* v. *Cutler*; upon the ſtrength of which and of ſome authorities, I ſhall mention under the next head, a recovery without cuſtom to warrant it will not be a bar to an intail of copyhold. The next queſtion is, whether a ſurrender will; as to which there is *Co. Lit.* 3 *Co.* 8. 1 *Brownl.* 1 *Sho.* 288. Indeed in *Skin.* 307, the words of *Holt* are general; but I will underſtand them in the reſtrained ſenſe in *Sho.* This opinion, that where there is no recovery by cuſtom a common ſurrender will do, is mentioned by Lord *Cowper* in 2 *Ver.* 583. which indeed was not the point he needed have conſidered: but though this is an opinion only, his next determination 2 *Ver.* 702. is delivered as a judge upon the very point in judgment. My opinion therefore is, that the ſame rule muſt hold, that a ſurrender of copyhold will be a ſufficient bar of the intail, where there is no recovery by cuſtom to bar it. As to the third point according to 1 *Bul.* 200. and many other caſes, I can conſider the will only as a declaration of the uſes of the ſurrender. The will is the ſame, as if it had been inſerted by matter *ex poſt facto* in the ſurrender, and will have relation; which is determined in a caſe of a ſimilar nature. *Co. Lit.* 59. *B.* and *Cr. J.* 199, 200. This ſurrender therefore is a good bar of the intailed copyhold, and conſequently the whole verdict muſt be entered for the defendant.

Willes Chief Juſtice.

I am the leſs concerned at differing in opinion in the preſent caſe, becauſe, tho' I cannot concur in the point of law, yet I think the opinion of my brothers attended with leſs inconvenience than mine; therefore am glad, it will prevail; and I differ but in one point. I agree, that an eſtate tail in copyhold is not created by cuſtom, but cuſtom co-operating with the ſtatute; and agree, that if it may be created by cuſtom, ſome way to bar it muſt be found out to prevent a perpetuity. Whether the cuſtom will be void, if there is no method of barring, I doubt. I agree alſo, that a ſurrender will bar ſuch eſtates, if there is a cuſtom for it, according to the expreſs words of *Co. Lit.* 60. and Lord *Coke* would never have ſaid, that if an eſtate may be created by cuſtom, a ſurrender by cuſtom will bar it, if it was then eſtabliſhed, that a ſurrender without a cuſtom will bar: his opinion therefore muſt be, that there muſt be a cuſtom to make a ſurrender good. If there is no other way to bar, I admit, a ſurrender would without a cuſtom from neceſſity to avoid a perpetuity: but if there is a way of barring, there is an end of that queſtion. Forfeiture and regrant is not an adequate argument, that there is no occaſion for a ſurrender. I will not enter into that,

becauſe it is not before me, but ſhould as at preſent rather think, that if there was a manor, in which ſuch a cuſtom exiſted, that cuſtom would bind all the parties, and that might be a good way of barring: but although without a cuſtom it might be a bar, it is not ſuch a method, as will preclude the other, becauſe not in the tenant's power; for unleſs there be a cuſtom, if the lord will not conſent, it cannot be done, and is therefore no method at all. I agree alſo, that if a ſurrender will bar, this ſurrender to uſe of the will will do it. It is objected thereto from the abſurdity, that would follow in other caſes, which I do not concern myſelf about; as that if tenant in tail can bar, it muſt be by ſome act in his life, whereas a will cannot take place until after death, and the ſurrender and will making but one conveyance the ſurrender operates not until after death, and then it is abſurd to ſay, a man can bar, after he is dead. That has already received an anſwer; and further, when there is a will and admittance, that has a retroſpect to the ſurrender to all intents; and it is therefore a bar from the time of the ſurrender, not from death of the teſtator: otherwiſe a ſurrender to uſe of the will would not bar ſurvivorſhip in the caſe of joint-tenants. In *Co. Lit.* 59. *b.* taken notice of in 3 *Lev.* 385. are parallel inſtances to this. But I cannot think, a ſurrender will bar, if there is any other method. If a recovery will do, there is no neceſſity of a ſurrender to bar: but there is plainly no cuſtom one way or other. A cuſtom muſt be time out of mind; ſo that one inſtance has no tendency to a cuſtom. I think, a recovery without cuſtom will bar; and if ſo there is no occaſion for a ſurrender to bar. *Lit. ſec.* 76. Plaints in nature of a real action may be in the Lord's Court. *Kitchin* (a book of good authority, and the rather becauſe founded on old determinations not advancing fancies of their own) is clear, that ſuch a recovery will bar, making a diſtinction between recovery with voucher and without. Except *Cr. E* 391. there is no caſe before *Snow* v. *Cutler*, where it is ſaid it will not bar; but many caſes, where it is ſaid it will; ſome, where *dubitatur*. In ſeveral caſes it is ſaid, that with voucher they will be a bar, without voucher only a diſcontinuance. *Cr. E.* 391. does not appear whether with voucher or not. I ſhould rather think it implied from Lord *Coke*'s inclination, that a recovery will bar without cuſtom, though he has not ſaid it. Conſider the other caſes ſince: but firſt as to an objection to theſe recoveries barring from the reaſon of recoveries barring in caſes of freehold, *viz.* the recoveries in value the remainder man has, which cannot be in copyhold caſes becauſe to the lord's prejudice; it is well known to be nothing but a fiction; the common vouchee is to make ſatisfaction; and I cannot argue merely from a fiction, or ſay that a thing, which is a fiction in the caſe of freehold, ſhall be a reaſon, why recovery in caſe of copyhold ſhall not bar. This would be a ſtrong argument againſt barring either by ſurrender or recovery with cuſtom, becauſe there is

no ſatisfaction; which would go too far; therefore as to the reaſon of the thing there is no objection. I do pay great deference to the laſt caſe; though not ſo great as to ſay it is always binding: but no deference to caſes is due, without they appear to be the point in queſtion: and there was no occaſion in *Snow* v. *Cuſler* to determine that point at all. I cannot look on that as an authority, and much leſs the caſes cited out of *Ver.* againſt the authority of the former books. I have a great regard for a court of equity and for Lord *Cowper*'s memory; and if this had been the point in queſtion, and ſent by him upon his doubting to a court of law, that indeed would have great weight: but there was no occaſion to determine that there: nor is *Vernon* a very exact reporter. I agree with the particular method mentioned by Lord *Cowper*: but this *vexata quaſtio* was not at all conſidered there. As a recovery may be ſuffered in the Lord's court, I cannot think, a ſurrender will bar: but am ſatisfied, that unleſs this comes to be the eſtabliſhed opinion, great inconvenience will ariſe to copyholds, and wiſh, the legiſlature would remedy it: nay I hope, my brother's opinion will determine it: but I cannot think, the law is ſo. The occaſion of this method is from the ignorance of ſtewards of copyholds, who know not how to ſuffer a recovery, and therefore chuſe to do it by ſurrender.

My brother *Abney* before his death declared himſelf of opinion with my two brothers: therefore a general verdict muſt be for the defendant.

Caſe 211. Southby *verſus* Stonehouſe, *June* 30, 1755.

Eſtate tail, in a will.

Feme covert by will purſuant to power leaves to huſband "all the profits and revenues of my eſtates of A. and B. for life; and after his death my ſaid eſtates to my children, if I ſhould leave any to ſurvive me; but if I ſhould leave no ſuch child or children, nor the iſſue of ſuch, the ſaid eſtates to J. H. making him ſole heir in default of iſſue and after the death of my huſband." The children take an eſtate tail, not fee ſimple, and the remainder to J. H. is good; not a contingent executory limitation on her dying without children living at her death, but a general dying without iſſue.

THE daughter of Sir *Nicholas Criſp*, being intitled to a very conſiderable fortune both real and perſonal, (the former of which only was now in queſtion), intermarried with the defendant. Articles were made before the marriage; but what they were, did not appear. Afterward a ſettlement was made of her eſtate by two deeds; the firſt in *July* 1740. which compriſed her eſtate in *Wiltſhire*; the other in *May* 1748. compriſing her eſtate in *Oxfordſhire*.

The firſt was to truſtees and their heirs during the lives of huſband and wife to preſerve contingent remainders; and the truſt of that eſtate was declared to be to the ſeparate uſe of the wife for her

her life; and after her deceaſe the truſtees were directed to pay the profits to the huſband for his life, or ſo much as ſhe ſhould direct and appoint; and after deceaſe of the ſurvivor of them it was declared to be to the uſe of ſuch child and children of them for ſuch eſtate and eſtates, and in ſuch ſhares and proportions, manner and form, limitations and conditions, as the wife ſhould limit or appoint by act in her life, or by will, or writing in nature of a will; in default of appointment, to all the children equally to be divided as tenants in common and their reſpective iſſues with croſs remainders in tail; if only one child, to ſuch one child and the heirs of it's body; in default of ſuch iſſue, to ſuch perſon or perſons as ſhe ſhould appoint; in default of appointment and of iſſue, to the defendant the huſband for life, remainder to her own right heirs.

By the ſecond deed of the *Oxford* eſtate a term is created to raiſe money, remainder to truſtees during the joint lives of huſband and wife for her ſeparate uſe, and afterward to the huſband, and after deceaſe of the ſurvivor as ſhe would appoint; in default of appointment to the huſband for life, reverſion to the right heirs of the wife.

In execution of this power the wife in 1751 made a will, taking notice that ſhe had notwithſtanding her coverture by her marriage-ſettlement power to diſpoſe of her fortune, as ſhe ſhould think fit, and deſiring her executors to diſpoſe in manner following, with this clauſe; "*Item*, I leave and bequeath to my dear huſband all the "profits and revenues of my eſtates at *Buttermee* in *Wiltſhire*, as "alſo all the profits and revenues of my eſtate at *C*——— in *Ox-*"*fordſhire*, both for his natural life, ſubject to the payment of an-"nuities; and after the death of my dear huſband I give and be-"queath my ſaid eſtates to my dear children, if I ſhould leave any "to ſurvive me: but in caſe I ſhould leave no ſuch child or chil-"dren nor the iſſue of ſuch child or children, and after the deceaſe "of my dear huſband, then I give and bequeath the ſaid eſtates "to my worthy friend *J. Hutton*, making him hereby ſole heir "of this my laſt will and teſtament in default of iſſue left by me, "and after the death of my dear huſband."

At the time of making the will ſhe was with child, and was brought to bed of a daughter *Anna Benigna Stonehouſe*, and died not very long afterward. The daughter ſurvived her mother, but died without iſſue an infant of tender years, and at the time of her death left the plaintiff her heir at law on the part of her mother, who brought this bill claiming to be intitled to the reverſion in fee of the eſtates in queſtion, to have care taken of the deeds and writings concerning the title of the eſtate, and to reſtrain the tenant for life from committing waſte: ſhe left alſo an uncle her heir at law on

the part of her father; and *J. Hutton* claimed the remainder in the will of her mother.

Lord Chancellor taking time to conſider of the caſe, now delivered his opinion.

The queſtion ariſing upon this ſtate of the fact is a queſtion of conſtruction; for the court muſt make ſuch a conſtruction, as is moſt reaſonable and warranted by the words and intent. The relief prayed by the bill (if the ſuggeſtions therein are right) is an ordinary relief for a remainder man or reverſioner in fee againſt the tenant for life, and for the equal benefit of all parties intereſted: but as to the latter part of the relief prayed (which, if the facts warrant it, is proper) there is no proof of any waſte committed, or of an attempt toward it.

Writing in nature of a will by feme covert under a power not a proper will, and the appointees take under the power coupled with the writing. Yet it has effect of a will to three intents; the words have the ſame liberal conſtruction; it is ambulatory until teſtator's death, whom appointee muſt ſurvive, and can take only from teſtator's death.

Before I go to the particular point, I will lay down three principles, by which I ſhall govern myſelf in my determination, and by which all caſes of this kind are to be governed. Firſt, this is not a proper will, but a writing in nature of a will by a feme covert in virtue of a power reſerved to her in two deeds of ſettlement; and therefore whoever takes under this will, takes by virtue of the execution of the power and by the power coupled with the writing, and as if the limitation in that writing of appointment had been contained in this deed creating the power; for they take from the author of the power. But notwithſtanding that, though ſuch writing is not a proper will, it has the effect and conſequence of a will to three intents. Firſt, the words are to have the like conſtruction as if it was a proper will; for otherwiſe there would be a ſtrange confuſion in the conſtruction of writings, if they were to have one conſtruction where proper wills, and another where improper; the words therefore of ſuch writings are to receive the ſame liberal and beneficial conſtruction as the words in a proper will. Secondly (and that is the ſecond principle, I lay down) ſuch writing in nature of a will, though not a proper will, is ambulatory until death of the teſtatrix; and therefore though the party taking thereby takes by virtue of and under the power, yet notwithſtanding that, ſuch appointee muſt ſurvive the teſtatrix, before he can take. Next, if they do ſurvive the teſtator; thirdly they can take only from the time of the death of the teſtator, that is the conſummation of the writing; and then they do not take as from the time of the power, but the operation and effect is only to take and veſt the eſtate from the time of the conſummation of the act by the death of the teſtator. So far ſuch writing has the property of a will. Theſe points were fully conſidered and ſo held by me in *The Duke of Marlborough* v. *Lord Carliſle*, though there was no particular caſe where it was ſo determined. The next principle, I lay

lay down, is, that it appears, the teſtatrix intended to diſpoſe of and to execute a power over her whole eſtate, and not to dye inteſtate.

Next as to the points in the caſe; and there is really and truly but one queſtion; that is to determine what eſtate the infant took on the death of her mother: all the other queſtions will follow the determination of that.

Three conſtructions have been put on this will, and the intereſt the infant took upon the death of her mother. Firſt, for the plaintiff it is inſiſted, that ſhe took an eſtate tail, but that as to the reverſion in fee expectant thereon, that did not paſs by the will either to the heir or to *J. Hutton*; that *J. Hutton* had not an abſolute veſted remainder, but only a contingent executory limitation upon her dying without any children living at the time of her death; which event not happening, *J. Hutton* the remainder man cannot take; and therefore the reverſion in fee upon the eſtate tail being in this event not given away, deſcended to the daughter from her mother as her heir at law, and then it muſt deſcend from her to her heir on the part of her mother. The conſtruction put for *J. Hutton* is this; thus far he agrees with the plaintiff, in ſaying that the daughter took by the deviſe an eſtate tail: but afterward they divide, and *J. Hutton* inſiſts, that the reverſion in fee expectant on the eſtate tail did not deſcend from the mother to her, for no reverſion in fee was left to deſcend, but the remainder in fee is deviſed to *J. Hutton* upon a general dying without iſſue, which has happened, and attached now in poſſeſſion. The uncle inſiſts, that neither of theſe is the right conſtruction, but that the infant took an eſtate in fee by virtue of the deviſe; for that it is a deviſe of the fee with a double aſpect according to *Lodington* v. *Kime*, that is, the fee ſimple itſelf is to take place in different perſons upon the event happening one way or the other; and that may be good and clear law, that though a remainder cannot be mounted on a fee, yet there may be a fee-ſimple with ſuch a double aſpect, which is not a remainder mounted on a fee: and therefore he ſays, that the infant would take this eſtate by virtue of the appointment, but referred to the power, and conſequently as if her name was inſerted in the power, and ſo by purchaſe, and then to her heir on the part of the father, not of the mother.

Eq. Ab. 183. Fee ſimple with double aſpect, not a remainder on a fee.

I will firſt conſider the conſtruction put by the uncle, to lay it out of the caſe; for I am of opinion, that I cannot conſtrue this a deviſe of the fee ſimple to the infant. That it is not ſo, appears plainly from the words of the will. A good deal has been ſaid at the bar concerning the paſſing the inheritance by this will, and in what manner; and that the fee paſſed by virtue of the words *all my*

Eq. Ab. 178. *eſtate*, according to the general words in *Lady Bridgwater* v. *Duke of Bolton*, that *eſtate* is *genus generaliſſimum*; in anſwer to which a diſtinction was made, that this was local, deſcribing only the thing, not the intereſt in it, and therefore that it was not ſufficient to carry the fee. Now if it reſted upon that, I ſhould think otherwiſe; becauſe it is not certainly determined, that the barely ſaying *all my eſtate at ſuch a place* without more words is to be conſidered as ſo local as not to comprehend the intereſt in the thing. *Wilſon* v. *Robinſon*, 2 *Lev.* 91. was local: and yet the court held, that *all my tenant right eſtate* notwithſtanding the locality of the ſubſequent words was a deviſe of the fee, and carried the eſtate and intereſt in the lands as well as the lands. It is ſtronger in the preſent caſe from the diſtinction made by the teſtatrix, that when ſhe gives to her huſband, ſhe gives by expreſs words the uſufructuary intereſt, *all the profits and revenues*; when ſhe gives to her children, ſhe gives *all my ſaid eſtates*; and that ſhews a different intent, that one was only as a gift of the preſent profits during life, the other as a gift of her whole intereſt. But this point is not neceſſary, and therefore not quite proper to determine. But here are words of limitation added by the will; and then whether the teſtator uſes the words *lands*, or *tenements*, or *eſtate*, it is the ſame; for then the words of limitation ſhall govern what eſtate the appointee or deviſee ſhall take, and not the general words. I am of opinion upon theſe words, that they create an eſtate tail in the child or children; and the particular reaſons for that I will give under the next head. But I think, the court can never conſtrue it to give them a fee ſimple; for where there is ſuch an imperfect will, as this is, and the court is compelled to make a conſtruction upon the words to anſwer the intent, the court ought to make a reaſonable conſtruction; and there would be an abſurd conſequence from conſtruing this a deviſe in fee ſimple to all the children; the conſequence would be to make a conſtruction, that if ſhe left iſſue of a child or children living at the time of her death, this iſſue muſt take this eſtate; and if all the children are to take a fee ſimple, they muſt take as jointenants in fee; then ſuppoſe, ſhe had lived longer, and had two or three children, and one or two of them died leaving children in her life, and then ſhe had died leaving a child ſurviving her and ſeveral grand-children, would all thoſe have taken by theſe words? How muſt they take? Should the ſurviving child only take an equal ſhare as jointenant with the grand-children, how abſurd that would be. Then if any one died, the whole eſtate of that one would ſurvive to the others, though he left children, and ſo his family be unprovided for. Indeed if that child came of age, he might ſever the jointenancy: but if he died before, it would ſurvive to the other jointenants. In making a conſtruction the court will never reſort to that, wherein are theſe abſurdities; therefore I am of opinion, together with the additional reaſons mentioned under the

Deviſe of all my eſtate at A. not ſo local as not to comprehend the intereſt in the thing, as well as the lands.

Argumentum ex abſurdo.

the next head, that this is not a deviſe of the fee ſimple to the child.

If ſo, then the next queſtion is, whether the child or children, that ſhould be left by her would take an eſtate tail, and with what kind of intereſt, or whether there would be a reverſion in fee to deſcend, or a remainder over? I am clearly of opinion, that the child took an eſtate tail by virtue of this, though an imperfect, will; and much ſtronger conſtructions to create eſtates tail have been made by courts of law. Firſt, conſider the intereſt, the children take; which will determine the other. It has been objected, that theſe words muſt be conſtrued only children and iſſue, ſhe ſhould leave at the time of her death, and that therefore the remainder given over is a contingent, executory intereſt, to take place only, if ſhe left no children at the time of her death. The words, *if I ſhould leave any to ſurvive me*, are quite nugatory; for no perſon can take under a will unleſs upon ſurviving the teſtator; and then the queſtion is, whether it is neceſſary to carry on thoſe inoperative, ineffectual, words to the ſubſequent part of the deviſe? It is not at all neceſſary: ſhe meant to deſcribe, if I ſhall leave no children at the time of my death, nor iſſue at any time, I give my eſtate over. To make eſtates tail continue in the regular intail, much ſtronger deciſions have been made, notwithſtanding the words ſeem to have been confined to a particular time, and not a general dying without iſſue; as in *Lee*'s caſe, 1 *Leo.* 285. where a conſtruction was made to anſwer the intent of the teſtator, and to keep the eſtate in the proper channel of deſcent according to the intent, by holding that though the words pointed out a dying, without iſſue at the time of the death, it related to a failure at any time afterward. Another caſe is *Spalding* v. *Spalding*, *Cr. C.* 185. which was a very ſtrong conſtruction upon the words of a will imperfectly penned, and helped out even by the inſertion of words. This ſhews how liberal a conſtruction courts of law have made to continue eſtates tail in the line. Upon this head another caſe is material to the general doctrine, though not directly: that was a caſe of great argument, *Shaw* v. *Weigh* in *B. R.* afterward in the *Houſe of Lords* by the name of *Sparrow* v. *Shaw*, where the *Lords* reverſed the judgment of *B. R.* and their opinion was grounded upon this, to preſerve the eſtate in the right channel according to the intent of the teſtator; and for that general reaſon only I mention it, that ſuch conſtruction is to be made of a will, as to preſerve the eſtate in that channel of deſcent the teſtatrix intended it ſhould go. The plaintiff therefore and *J. Hutton* are in the right in this, that the infant took an eſtate tail.

Wills conſtrued to preſerve eſtates in the intended channel of deſcent.

But then the next queſtion ariſes upon the point, in which they differ, who has the fee expectant upon that eſtate tail? Upon the words

words of this will I am of opinion, that on the conſtruction already made of the infant's being tenant in tail, it is an unavoidable conſequence that the eſtate has gone over to the remainder man *J. Hutton*. According to the opinion already given I have conſtrued the word *iſſue* to mean iſſue happening to be and determined at any period of time whatever, not to be confined to the death of the teſtatrix. Then the next limitation muſt be upon that event to *J. Hutton* the deviſee. The only objection to this conſtruction is, that this will not conſtrue the words according to her expreſſion in the former clauſe, but puts a different conſtruction upon the ſame words or the reference to the ſame words in two different events. Now that that may be done, there are authorities, and in a much ſtronger caſe, *viz. Forth* v. *Chapman*; where the greateſt difficulty in the way of Lord *Macclesfield* was, that the freehold and leaſehold were deviſed by the ſame words: and yet he held, thoſe words were to receive a conſtruction according to the ſubject matter. This caſe is in 1 *Will.* 664. the editor of which books has been very careful, and adds in a note there, that the limitation was confined to the leaſehold eſtate; but I think, that is a miſtake in the regiſter's book, for I have brought with me the brief, I had in the cauſe, and it is there, as Lord *Macclesfield* took it: and that was a difficulty, Lord *Macclesfield* ſtarted himſelf, which he never would have created againſt his own opinion, if it had not been ſo in the will: that therefore ſhews ſtrongly, that the ſame words may in the ſame ſentence have a different conſtruction applied to different matter. But abſtracted from that, there are other words afterward in the latter clauſe, upon which, laying the authority of Lord *Macclesfield*'s opinion out of the caſe, it is impoſſible to confine the conſtruction of *iſſue* there to iſſue at the time of her death, but that whenever there was a default of iſſue, *J. Hutton*'s remainder ſhould take place. *Default of iſſue* means failure of iſſue. Here the teſtatrix has only expreſſed in words the double contingency, that is in every limitation in remainder after an eſtate tail. Suppoſe an eſtate deviſed to *A.* for life, remainder to the firſt, ſecond, third, and fourth ſons of *A.* and the iſſues of their bodies, and in default of ſuch iſſue, over to *B.* thoſe words of limitation over include two contingencies, *viz.* if no ſon, or if all ſuch ſons die without iſſue. That was the diſtinction taken in *Higgins* v. *Dowler* by Lord *Cowper* upon the limitation of a term; and this is no more than ſaying, if I dye without iſſue living at the time of my death, it ſhall go over to *J. Hutton*, and it ſhall go over to him in default of iſſue left by me or on failure at any time. On this head I will mention no authority further, but a general one, *viz.* What is laid down by Lord *Hale* in the great caſe of *Purefoy* v. *Rogers*, 2 *San.* 388. that wherever a deviſe may be conſtrued as a remainder, courts will never conſtrue it as a contingent executory limitation; which I think of conſequence in the preſent caſe. This is very

Words in a will have a different conſtruction applied to different matter.

Double contingency in remainder after eſtate tail.

1 Wil. 98.

Remainder deviſed never conſtrued an executory limitation.

very reaſonably and naturally conſtrued as a remainder veſted, and then the court ought to conſtrue it ſo. What were the merits of this remainder man, is not for my opinion, but for the opinion of the teſtatrix.

I think myſelf bound to give this opinion to preſerve the uniformity of determinations given to preſerve eſtates tail in the channel according to the intent: conſequently if the plaintiff has not a claim to the reverſion in fee, he has no claim to the deeds and writings, and the bill muſt be diſmiſſed, but without coſts.

Clark *verſus* Guiſe, *July* 1, 1755. Caſe 212.

Maſter of the Rolls for Lord Chancellor.

THE plaintiff *Margaret Clark* ſerved as houſekeeper to *Richard Guiſe* and his partner, during the courſe of which he contracted a debt to her, and alſo for money for the purchaſe of furniture, and money lent. In 1748. he makes a will, deviſing among ſeveral other legacies 50*l. per ann.* to the plaintiff during life out of his real and perſonal eſtate to be paid punctually every year; and then goes on, "whereas I am indebted to her in "the ſum of 500*l.* ſhe having my obligation for 680*l.* 2*s.* 4*d.* "*Memorandum* paid her 100*l.* to let Dr. *Blagrave* have, and at "divers times having paid her 80*l.* I make the balance, and I am "indebted to her in the full ſum of 500*l.* I ordain this to be "paid her out of my real and perſonal eſtate.

A. in his will recites the amount of a debt due from him, and orders it to be paid, and gives a legacy to the creditor, who may claim that, and alſo diſpute the calculation of debt by the teſtator, whoſe intent was to pay the whole, and give the legacy beſide.

The bill was brought to be paid her whole debt, the teſtator having miſcalculated it, and alſo to have her annuity under the will.

For defendant the general rule in *Noys* v. *Mordaunt*, 2 *Ver.* 581. was inſiſted upon, that if the plaintiff reſorted to her legacy, ſhe muſt wave the demand againſt the teſtator's eſtate, and take the computation made by him in his will. So in *Jenkins* v. *Jenkins*, where a father recites by his will, that he as executor of *David Lewis* was obliged to pay his ſon ſeveral ſums particularly, and ſeveral payments having been made (ſome of which were allowable, others not) he liquidates it to a ſum certain, and gives the ſon ſeveral legacies; on a bill by the ſon it was decreed at the *Rolls*, that he was intitled both to the legacy, for which his father was debtor to him, and alſo to the legacies under his father's will. Lord *Talbot* varied that decree, ſaying the plaintiff muſt make his election, muſt ſubmit to the adjuſtment of this debt, otherwiſe the perſons

prejudiced by his reſorting to his debt muſt have the benefit given to him under the will.

Sir *Thomas Clarke.*

The queſtion is, whether the plaintiff is to be concluded by the deſcription or account (as it is called) liquidated by the teſtator in his will, and is obliged to make her election? The general rule relied on for the defendant, which has obtained ſince *Noys* v. *Mordaunt*, is clear, that where a man does by will more than he has ſtrictly a right to do, and gives a bounty to the perſon, in whoſe prejudice that is done, the perſon prejudiced by one part ſhall not inſiſt upon his right and at the ſame time upon the bounty by the will. The ſame thing was attempted in Lord *Somers*'s time, but did not prevail; as appears from *Lawrence* v. *Lawrence*: but ſince *Noys* v. *Mordaunt* it muſt be looked upon as ſettled, that claiming in one part of the will by the intent of the teſtator they ſhall not contradict another part. To examine whether the general rule is applicable to this, what was the intent of the teſtator? It was not to make a compoſition of a debt he owed the plaintiff, not to give part in lieu of the whole of it, but to pay her her whole debt beſide the 50*l.* annuity. Suppoſe the teſtator had not been ſo particular, but recited in general, that whereas he had given her 50*l. per ann.* and whereas he was indebted to her 500*l.* he orders her to be paid that 500*l.* out of his real and perſonal eſtate; the teſtator's miſrecital would not preclude her from ſaying, more was due to her. It falls within the caſe of *Milner* v. *Milner*; where the court rectified the miſcomputation of the teſtator; ſaw, the intent was, that the daughter ſhould have 10000*l.* in the whole; and though the teſtator miſtook the particulars to make up that ſum, it was *error demonſtrationis*, as it is called in another law. That caſe is much ſtronger that this; for that was a miſtake in a bounty intended by the will; and it was a conteſt with the perſon, who had the honour of the family. Beſide the preſent caſe would have been much more favourable for the defendant, if there had been a connexion between the *quantum* of the bounty and of the debt; but the teſtator has left them unconnected; gives the 50*l. per ann.* independent or unconnected with the other; and therefore free from that circumſtance which has ariſen in other caſes of this kind, where that rule has been inſiſted on. It is not a ſtated regular account, nor can it have that conſequence or effect, but at random, a kind of lumping the ſums paid her; therefore the teſtator could not think himſelf, that he took it in an accurate way; as appears from his following words, *I make, &c.* His material deſign was to pay the whole debt; the bounty was unconnected with the debt. In *Jenkins* v. *Jenkins* the court went on this, that the teſtator knowing what he owed, made a compoſition with his ſon. But it is ſaid, what ſervive would it be

2 Ver. 365.

Ante, 11 July 1748.

be to take that account in his will, if that was not his intent. It might be of ſervice before the Maſter as a check on the plaintiff and to prevent an unreaſonable demand. Nothing then, that will be done in this caſe, tends to weaken that reaſonable and eſtabliſhed rule, from which this is diſtinguiſhable, the teſtator not intending that any particular ſum ſhould come out of his eſtate, any otherwiſe than as ſuch ſum amounted to the whole of the debt. Nor does this prejudice the reſiduary legatees; for the reſidue being given after payment of debts, it is conſequently uncertain; and they cannot ſay, they ſuſtain prejudice, if this debt turns out larger; ſo that the rule is ſafe, and the intent of teſtator is preſerved this way, and no otherwiſe.

Flight *verſus* Cook, *July* 1, 1755. Caſe 213.

At the Rolls.

A. covenants, that a ſpecifick ſum ſhould be paid to B. if B. ſurvived: A. having aliened part of it, on a bill by B. A. gave ſecurity, that it ſhould be forthcoming.

UNDER articles, executed on the marriage of *Philip Cook*, the plaintiff, in caſe ſhe ſurvived *Philip Cook*, claimed a contingent intereſt in two ſeveral ſums of 100*l.* each, the one in *South Sea* annuities, the other due by a promiſſory note of *J. B.* both which were ſpecifically appointed for payment of the plaintiff in that event.

The bill was upon the principle *quia timet*; for that as the defendant had aliened or threatened to alien thoſe ſums, there might be nothing to anſwer that intereſt, which may become beneficial to the plaintiff; and the defendant admitted, he had ſold out 100*l.*

For defendant was cited *Lord Warrington* v. *Langham*, *P. C.* 89. *Eq. Ab.* 132. that parties muſt reſt on the original agreement, and no further ſecurity ſhould be given: ſo 1 *Wil.* 460. and 2 *Ver.* 635. 1 *Wil.* 107.

Sir *Thomas Clarke.*

This bill is not for a ſpecifick performance, but to vary the agreement of the parties, and to put the plaintiff in a better ſituation than the agreement itſelf left the plaintiff; the agreement being to put the 200*l.* in ſuch a ſituation as to be forthcoming at defendant's death if the plaintiff was then living: whereas this is to accelerate the payment in defendant's life, and inſtead of leaving it in his power obliges him to pay it into court or give ſecurity. It is truly ſaid, that though this is a juriſdiction this court has often exerciſed, yet will it be extremely tender in ſo doing; becauſe it materially varies the agreement of the parties at the time of the tranſ-

tranſaction, and it would make ſtrange work in trading kingdoms if done lightly. The laws of other countries admit of caſes to prevent extravagancy: though not here, as a trading country. In inſtances of this kind the court always very tenderly interpoſes. Though the court cannot accelerate payment, or put payment of the money in a better ſituation, yet in certain circumſtances parties have met with relief. The queſtion then is, whether a proper foundation is laid before the court to interpoſe and exerciſe that juriſdiction for the plaintiffs ſecurity? In oppoſition to which ſeveral caſes are cited. *Lord Warrington* v. *Langham* is an authority, ſo far as it goes, where the bill was diſmiſſed, though it ended by compromiſe in the *Houſe of Lords*; yet it ſhews, that the court will not put covenantee in a better ſituation, than the covenant left him; for it is different from the caſe of executor as to him and legatees. The other two caſes are diſtinguiſhable: in one the party had an alternative, and no ground to take it away; and as to the covenant of tenant in tail not to bar but let it go to the iſſue in tail, he there did an act tending to keep it longer in his family. But on conſidering how this ſtands, I cannot ſay, but there is juſt ground, from what has been done (which is a fair way of arguing) to induce the court to interpoſe in ſome manner for the plaintiff. In general the marriage-articles leave it ſo as to be a ſpecifick agreement binding them; and the defendant has confeſſedly altered the thing itſelf ſo ſpecifically engaged; which makes it ſtronger than *Lord Warrington* v. *Langham*, which was a general engagement to pay: this was particular and ſpecifically engaged, and left in his hands as truſtee to anſwer the purpoſes of the marriage-articles. His ſale is ſuch an alienation or breach of contract, that the party comes into equity in a ſtronger caſe than in former inſtances of interpoſition by this court even before breach of covenant. Here he has directly broke his covenant; and therefore it would be a raſh action to truſt to the event of things by the plaintiff's taking a chance, when this 200 *l.* is gone; therefore certainly ſome way or other the plaintiff is intitled to relief. But is the defendant willing to give ſecurity to be approved of by a Maſter for the 200 *l.* that it may be forthcoming at his death for the plaintiff's benefit, if the plaintiff ſurvives?

Defendant agreeing thereto, it was ſo ordered; and that in default of ſuch ſecurity he ſhould pay 200 *l.* into the bank.

Caſe 214.

Anonymous, *July* 3, 1755.

Injunction, to ſtay trial in actions by a corporation for petty cuſtoms, till anſwer, where defence at law may ariſe out of the anſwer.

MOTION on the part of the plaintiffs certain traders to ſtay trial in actions at law, brought by the defendants the corporation of *Exeter* for petty cuſtoms, and to continue the injunction already granted until diſcovery made by the anſwer of what thoſe cuſtoms were.

See my Law Tracts vol. 1. p. 132.

LORD

LORD CHANCELLOR.

The demand made by the actions at law is of great conſequence to the trade of this kingdom. Here is nothing but a ſhipload of hemp, which is a cheap commodity, and the demand for that is no leſs than 58*l.* for petty cuſtoms; which, if they have a right to, is a great burthen on trade; that makes it of conſequence. But though it is ſuch a demand, I will not introduce a new rule of equity to enable the defendants at law to make defence to it: but I am of opinion, this motion is upon the old rules of equity. It has been refuſed to inſpect at law into corporation-books, and rightly; becauſe courts of law will not give that liberty to any one, who has not ſome right or claim to it as being a member of the corporation: † ſo as to a manor, in a queſtion between lord and tenant a court of law will give liberty to inſpect books of the court-rolls, but not in a queſtion between a lord of one manor and a lord of another: yet on a bill in this court for a diſcovery, this court will grant it: ſo that the rule of diſcovery here by anſwer (unleſs a diſcovery is prayed, which ſubjects to a penalty) does not depend on the rule at law for inſpecting books of a corporation or court-rolls. This is a motion to extend an injunction to ſtay trial; and the general rule is on ſuch motion, that ſome reaſonable matter is laid before the court, that the defence at law muſt or may ariſe out of the anſwer of the defendant here; and it is highly reaſonable to ſtay proceedings at law in this caſe until that diſcovery is made, and that from the nature of the declaration. It is a demand of petty cuſtoms; which, I doubt, whether they can be claimed by preſcription; being different from tolls, which may ariſe from private rights, though they muſt be by grant of the crown. To ſupport tolls there muſt be either proved or preſumed a conſideration, on which they are founded. Petty cuſtoms, and antient duties of the crown, are different. It has been doubted, whether or no the crown could have them otherwiſe than by an act of parliament preſumed to be loſt; and that was a controverſy between Sir *John Davis* and *Yelverton* concerning the right of the crown to impoſition upon merchandiſe. If then the crown muſt have it by act of parliament, which muſt be within time of memory, how can a corporation or private perſon claim them by preſcription? By ſhewing a grant from the crown they might have them: upon this trial it may come out upon either of the *counts*; eſpecially on the *indeb. aſſumpſit*, which was laſt laid, they may ſhew ſome grant of the crown; and then the defendant in the action might have liberty to ſhew ſomething againſt that. This happens in ſeveral caſes, and where, notwithſtanding plaintiff is to recover by his own

The rule of diſcovery by anſwer (unleſs ſubjecting to penalty) depends not on the rule of law.

† But ſee 1. Term Rep. 609. & my references there.

Diſcovery granted here on diſpute between two Lords of a manor. Yet ſee 2. Vern. 38.

Petty Cuſtoms differ from tolls; it ſeems they cannot be claimed by preſcription even by the crown: but may by grant from the Crown.

ſtrength, yet ſhall have a diſcovery, as in a diſpute between two lords of a manor.

The injunction muſt be to ſtay trial until anſwer or further order.

Caſe 215. Walker *verſus* Preſwick, *July* 5, 1755.

Trade. Bill of ſale of a ſhip aſſigns the property.

PRESWICK and *Lacy* entered into a contract with the plaintiff that the plaintiff ſhould, purſuant to the articles, build a ſhip for them; which the plaintiff did. *Preſwick* made paid his moiety; *Lacy* did not. The builder of the ſhip gave the plaintiff a bill of ſale of the ſhip, the plaintiff gave *Lacy* poſſeſſion of it to ſail therewith purſuant to the articles, but kept all the documents, *&c.* of the ſhip, and was to draw on *Lacy* for his moiety; which he did, and the draughts were proteſted for non-payment. *Lacy* died; and his executors ſold his moiety of the ſhip to the other defendant *Preſwick* with full notice of all this; and he ſold to one without notice, for ought that appeared.

The bill ſought to come upon this ſhip as a ſpecifick lien.

LORD CHANCELLOR.

Specifick lien againſt vendee of land for purchaſe-money.

If the conveyance had been made of land, the money not paid, as againſt vendee, his heir, or any claiming under him as purchaſer with notice of this equity, the land may be reſorted to. This indeed is a chattel, the moiety being ſold as a chattel to *Preſwick* with notice, and he has ſold without notice. Muſt not he be liable to pay out of the money he received? I do not go upon the plaintiff's having a lien upon the ſhip from the building, *&c.* but upon having the legal and equitable property in this ſhip by bill of ſale made by the builder to the plaintiff; and therefore I have no occaſion to reſort to that other queſtion of the plaintiff's having a ſpecifick lien, the plaintiff having the property, which never altered. In all theſe caſes, you are to conſider the nature, courſe, and practice of the buſineſs; which in the caſe of a ſhip diſtinguiſhes it from the common caſe of ſale of goods; for in the caſe of a ſhip the conſtant courſe is, that the bill of ſale aſſigns the property.

One defendant may proſecute decree againſt another; as where co obligor pays for principal.

The rule of the court is, if the plaintiff is intitled to relief againſt both defendants, and one ought to indemnify the other defendant, who is decreed to pay to the plaintiff, the court often gives liberty to that defendant to proſecute the decree againſt the other. As where a ſurety pays money, the principal muſt undoubtedly

doubtedly indemnify the ſurety, and the court will make that decree over. Therefore the executors of *Lacy* muſt out of the aſſets re-imburſe *Preſwick*, for what he ſhall pay to the plaintiff for the moiety.

Co-defendants may read any thing proved on the part of the plaintiff, becauſe that is proof examined to againſt all the defendants.

Co-defendant may read evidence proved for plaintiff.

Drinkwater *verſus* Falconer, *July* 8, 1755. Caſe 216.

At the Rolls.

Legacies. Specifick legacy, if exiſting, the whole paid, though nothing left for pecuniary: but, if not exiſting, is gone. A debt ſpecifically bequeathed, and afterward voluntarily paid in, no Ademption of the legacy: if a compulſory payment, it may or may not be ademption according to circumſtances; for if a particular reaſon is given, or if replaced on ſame fund, or ſo ordered, it is no ademption.

See 1. P. Wms 464. with Mr. Cox's reference there, to which add 2. Bro. Cha. Cas. 108.

SARAH IRESON in 1746, having 400*l.* new *South-Sea* annuities, and 400*l.* *Eaſt-India* ſtock, makes her will; by which ſhe orders all her debts to be paid; then gives "to my "friend and ſervant *James Falconer* 10*l.* *per annum* for life, to be "paid out of my dividends of 400*l.* in the joint ſtock of *South* "*Sea* annuities, now ſtanding in the company's books in my "name, by half yearly payments;" and after his death the ſaid annuity to his wife for life in the ſame manner; "and I do hereby "charge my ſaid annuity ſtock with payment thereof accor- "dingly; and I give to *J. D.* my 400*l.* *Eaſt-India* ſtock, and "alſo my 400*l.* joint ſtock in *South-Sea* new annuities, ſubject "to the payment of ſaid annuity, to my couſin *Mary Burkett*, "and after her deceaſe to her children;" and after ſome pecuniary legacies all the reſt and reſidue of her perſonal eſtate to *Sarah Thomſon*. In *Feb.* 1749 ſhe buys another 100*l.* *South-Sea* annuities; and in *March* following ſells 400*l.* *Eaſt-India* ſtock, and the produce thereof ſhe adds thereto to buy in new *Sea-Sea* annuities, 800*l.* Notice being given to the creditors of that fund to accept the reduced intereſt, ſhe not accepting the terms is paid off the 400*l.* new *South-Sea* annuities, ſhe originally poſſeſſed, and the 100*l.* ſhe bought in afterward, by a draught on the Bank; which draught ſhe delivers to one Mr. *Fiſher* with directions to him to inveſt it in the three *per cent.* annuities, if he ſhould think beſt. *Fiſher*, without ſignifying to her (as far as now appeared) that he did not think the three *per cent.* beſt, veſted that in theſe very *South-Sea* annuities. The teſtatrix ſhortly before her death makes a codicil, and thereby gives "to my loving couſin *Tho-* "*mas Bow* my note of 500*l.* which Mr. *Fiſher* now has for me;" then after ſome pecuniary legacies ſays, "I deſire, this may ſtand "as well as the will, which is in the hands of Mr. *Fiſher*."

The bill was brought by the ſurviving executor to ſettle the claims of ſeveral perſons under the will.

Sir

Sir *Thomas Clarke.*

If the payment is a mixed act by the debtor and creditor, it is doubtful. But if teſtator makes a ſubſequent diſpoſal of it to another, it is adeemed.

The bequeſts of the 400*l. Eaſt-India* ſtock, and the 400*l.* new *South-Sea* annuities, and alſo the 10*l. per annum* charged, are undoubtedly ſpecifick bequeſts, deſcribing the fund by a proper pronoun, *all my*, &c. The rules as to ſpecifick legacies are known; in ſeveral things they are preferred to pecuniary legacies, in others not. They are intitled to this advantage, that if there is not a penny for the pecuniary, a ſpecifick legatee ſhall take the whole, if that exiſts; on the other hand if it does not appear on the death of teſtator, it is gone, and the general aſſets cannot be reſorted to. To apply theſe rules: firſt as to the 400*l. South-Sea* annuities; that exiſted, and is rightly compared to a debt owing from the publick to the teſtatrix. The debtor afterward inſiſting on better terms, or to pay it off, the teſtatrix in conſequence of not accepting the terms offered by the publick is paid off. If it reſted here, merely upon the notice of the company and her not accepting the terms, it might upon the diſtinction taken in ſeveral books have admitted of ſome doubt, how far that ſhall amount to an ademption of the legacy or not; becauſe as to the payment this was a kind of mixed act, and ſo far different from thoſe caſes; for it might be ſaid, the payment was partly owing, to what was inſiſted upon by the debtor, and partly to the non-compliance on the other ſide. But I will take it both ways without regard to the diſtinction between voluntary and compulſory payment. The payment was occaſioned by a mixed act of the debtor and creditor. But ſuppoſing it was a voluntary act, and that ſhe was merely paſſive, it is clear, that a voluntary payment of a debt to a creditor, who has ſpecifically bequeathed that, will create no variation in the thing bequeathed; becauſe the teſtator is out of the queſtion, has done no act to ſignify a variation of intention. Next, ſuppoſing the payment compulſory, that is upon not accepting the terms offered; that does not of courſe vary the caſe, but may or may not adeem the legacy according to the circumſtances, with which it is accompanied. If a man after having given a legacy compels payment in of the debt, that does not of itſelf import an ademption of the legacy; for he may have other ſufficient reaſons to induce him to call it in; which may be a compulſion of payment for the benefit of the legatee, ſo far from being an ademption, as if the debt was in danger of being loſt: the court therefore, where payment is compelled, does not conſider it as an ademption, but enters into evidence *quo animo* that debt was called in; and then it may be a doubt, whether or no it was owing to a change in the teſtator's mind: but if a particular reaſon is given, it will be far from being an ademption. This payment upon her refuſing to comply

comply with the terms, which was partly for her own benefit, partly for the legatees, had it ſtood on that alone, ſo far from being a change of mind in her to the prejudice, rather ſhews a deſign in favour of the legatee. Suppoſe a perſon compels the payment of a ſum of money, and afterward replaces that ſum upon the ſame fund again; if there is nothing more in the caſe, I think ſtrongly, that the will would have operated upon that new fund ſo acquired in the ſame way as before, ſo as to have paſſed it to the legatee notwithſtanding that previous change, it ſufficiently anſwering the deſcription in the will. If this 400*l.* had been replaced out, or even ordered ſo to be, by her, I ſhould have thought it no ademption of the legacy, if the caſe had depended on that without other circumſtances. But ſhe happens to have done a great deal more, making a ſecond diſpoſition of this very property; for the draught is delivered by her to *Fiſher*, (if in a different fund, it is ſtill ſtronger), and afterward by codicil gives that identical draught to the defendant *Bow*. The effect of that bequeſt is ſaying, "if he has not executed my direction by inveſting in that fund, which, I take for granted, he has not, "I give the thing coming in lieu of that;" according to the caſe where a real eſtate was deviſed, and evicted after death of the teſtator, and damages were recovered by virtue of a covenant in the purchaſe-deed; the queſtion was, to whom the damages ſhould go; and the court gave the damages in lieu of the thing to the deviſee. So in *Carew* v. *Coventry*, which was a deviſe of an eſtate to be exchanged with another belonging to a college in *Oxford*; and that the eſtate, the college was to give, ſhould go to *A.*; the college (whether prevailed on by the heir at law, as was moſt probable), refuſed to exchange, though greatly for their benefit; upon a queſtion between the heir at law of teſtator and his ſpecifick deviſee of that eſtate the heir ſaid, this is not the eſtate given to you, but another the college was to give; but the court held the deviſee intitled. So here the teſtatrix meant *Bow* ſhould have the note, if it exiſted; if not, the thing in lieu of it. Next conſider the 400*l.* *Eaſt-India* ſtock: this ſhe voluntarily ſells out; and with the produce and other money of her own added to it, purchaſes 800*l.* new *South-Sea* annuities. It is inſiſted on the part of thoſe, who had a ſpecifick lien on the 400*l.* new *South-Sea* annuities, that this being converted into the ſame fund, by virtue of that circumſtance and of the codicil, ordered to ſtand as well as the will, it intitles them to have recourſe to the 800*l.* new *South-Sea* annuities. This 400*l.* is to be conſidered as a debt, and within thoſe caſes where the debt is called in. It is to be conſidered as a ſhare in a partnerſhip: then ſuppoſe, one intereſted in a partnerſhip to a particular amount or ſhare, deviſes ſpecifically to *A.* his ſtock in trade and ſhare in partnerſhip; afterward ſells that out to another for a valuable conſideration; no

Ante. M'Kenſie v. Robinſon, March 18, 1741.

Ante. 22 July 1742.

On eviction of eſtate deviſed, the damages to deviſee. So of an eſtate in lieu of it.

doubt but that is an ademption of the ſpecifick legacy; for ſuch legatee muſt ſuffer the diſadvantages and inconveniencies, as well as be intitled to the advantages, attending that kind of legacy. Thus would it be, if it barely ſtood upon the ſelling out, without regard to what was done with the money; for if the teſtatrix places out that money upon another fund, it would be going a ſtep farther in prejudice of the legatee. Beſide ſhe has added more money to that; whereas if ſhe had deſigned this to anſwer the original ſpecifick bequeſt, ſhe would have kept this ſum diſtinct and entire. If under theſe circumſtances the immediate legatee of the partnerſhip or *Eaſt-India* ſtock could not have recourſe to that when changed and converted, *a fortiori* a perſon intitled to another fund can never have recourſe to this, unleſs there is ſomething in the codicil to occaſion that. It is clear therefore, that the original ſpecifick lien is gone. The caſe as to the 400*l.* *South-Sea* annuities will go a good way toward deciding the queſtion as to this 400*l.* It ſhews the teſtatrix knew, what an ademption was, the effect and conſequence of it; and then could not be ignorant of it, where ſhe was ſole actreſs, as ſhe was as to the ſelling the *Eaſt-India* ſtock. The will was ended as to the 400*l.* *South-Sea* annuities, the teſtatrix ſhewing a change of mind as to that; and ſo entirely inconſiſtent is the codicil with the will, that it not only gives the ſame thing to a different perſon, but gives legacies, which cannot poſſibly be paid together with thoſe in the will, there not being enough to pay all. One great objection is from that general direction in the codicil, that the will ſhould ſtand; but that cannot operate in the extent, the ſpecifick legatees would take: for it cannot operate to make good a legacy adeemed. A lapſed legacy by deviſee's dying in life of teſtator could not be made good by ſuch direction in a codicil, nor by parity of reaſon could a legacy adeemed, which is as much gone as a legacy lapſed. If it could not operate in contradiction to the operation of law, much leſs can it in contradiction to the acts of teſtatrix. Then the direction amounts to this; that the will ſhall ſtand ſo far as not contradicted by the codicil or other acts done by me; it does not operate by way of analogy to republication, which it is improperly called. Her acts operate in direct contradiction to the will; conſequently ſhe meant not to put the will in a better condition, which the ſpecifick legatees inſiſt upon to make good the legacies adeemed. Theſe annuities therefore are gone together with the ſpecifick legacies of the funds themſelves, out of which they were to come: and the defendant *Bow* is intitled to the produce of the note bequeathed by the codicil.

Codicil directing the will to ſtand, makes not good a legacy lapſed or adeemed.

Bridgman

Bridgman *verſus* Green, *July* 9, 1755.

Caſe 217.

THE bill ſought to call ſeveral perſons to account for a ſum of 5,000*l.* obtained from the plaintiff by the following means.

George Green, who was at firſt footman and afterward *valet* to the plaintiff, prevailed on his maſter, over whom he had got great influence, to convey an eſtate to him on pretence of qualifying him to kill game. Though there was a formal livery of ſeiſin, he never was in poſſeſſion, and the rent was ſtill paid to the plaintiff, who afterwards ſold that eſtate, and conveyed another to *George Green* in conſideration of his delivering up that and upon the ſame pretence as before; but the rent ſtill continued to be paid to plaintiff. Theſe conveyances were executed at ſuch time, as *G. Green* had got the plaintiff to live ſeparate from his wife, and imported on the face to be in conſideration of 3,500*l.* but no money was ever paid or intended to be paid, and on the defendant's part was read a letter under the plaintiff's own hand deſiring to have 3,100*l.* inſerted in the deed as a conſideration. Then the plaintiff makes a mortgage of his whole eſtate, in which *G. Green* was not conſidered as owner; and the pretence of mortgaging was to enable the plaintiff and *G. Green* to travel and to learn the languages for that purpoſe. The money raiſed by the mortgage was 5,000*l.* of which 3,000*l.* was paid to *G. Green* and his wife; 1,000*l.* to *Thomas* the brother of *G. Green*; and 1,000*l.* to *William Lock*, the attorney employed in the mortgage, but in truſt for ſon of ſaid *William*, who alſo got from the plaintiff two promiſſory notes for 105*l.* and 123*l.* the one for procuring the money, the other for his bill of coſts.

Deeds entered into by fraud and impoſition relieved againſt.

Conveyance for conſideration, not afterward to be ſet up as a gift.

And being for fictitious conſideration inſerted by grantor himſelf, though found a gift by a jury, ſet aſide in equity.

The plaintiff brought his action for this money, and was nonſuited at *Glouceſter* aſſizes.

The grounds of his preſent bill were two. Firſt, that he was weak and liable to be impoſed upon, and that advantage was taken by an artful ſervant: ſecondly, that this is a conveyance made and this money paid on a fictitious conſideration now ſet up as a gift.

LORD CHANCELLOR.

Next to the ſurpriſe and concern, one has to ſee perſons enter into ſuch a combination as this, is the ſurprize to ſee it contended in a court of juſtice. It is moſt extraordinary to think a court of

juſtice can wink ſo hard as to ſuffer it to be ſupported. As to what was alluded to at the bar, I will only ſay, that in caſe what was alluded to, was proved, I ſhould notwithſtanding be obliged to make the ſame decree as now; for it is incumbent on a court of equity to act by ſuch rule, as tends moſt to diſcountenance the crime; by the like rule courts of law make as to conditions: but I make no ſuch conſtruction, but go on the facts and evidence before me, by which it is the plaineſt caſe of impoſition of ſome kind or other. As to the 1,000*l.* which *Thomas Green* and *William Lock* have got, there is nothing to ſupport it, not a ſyllable of gift or intention of gift; and not only no conſideration, but there is nothing to found a conjecture upon; this is left entirely undefended; and that throws a complexion upon the whole, if it wanted that; it ſhews they did what they thought fit, and divided his property, as they pleaſed. It is plain, that the original of this took riſe from a pretence of qualifying *G. Green* to kill game; and as plain, whether from that cauſe or pretence or any other, that this advantage was taken at the time, that they had got the plaintiff's wife away from him; and as plain, that this *G. Green* was the evil inſtrument in creating diſſenſion between him and his wife; and under this influence he had gained, however it was, he got the conveyance of an eſtate under this pretence of qualifying, frequently ſo declared by himſelf; which was plainly not intended to be a real conveyance; and when that eſtate was ſold, no conveyance was made as from *Green*. The next conveyance took riſe from the ſame cauſe, and that by reaſon of delivering up the firſt eſtate; and therefore all theſe are connected together; and the money got for the mortgage was diſtributed among them. As to the improper parts *Green* acted as to his maſter and his wife, it is not neceſſary to repeat them. As to the firſt ground for ſetting this aſide I do not go upon this, that the plaintiff was ſo weak as not fit to manage his affairs: he was not ſo; he was a very imprudent man, but not ſo weak as to be called a fool. Liable to be impoſed on he was; but the ſtrong ground here is, that theſe conveyances, in conſideration of which this money was paid or pretended to be paid, were made originally upon a conſideration pecuniary inſerted in the deeds, which is now ſet up as a gift. This court will not ſuffer one to take a conveyance for conſideration, and afterward ſet it up as a gift; and many conveyances have been ſet aſide upon that. The ground of that was ſaid for the defendant to be, that if a fictitious conſideration was inſerted in a conveyance, ariſing from the grantee, the court would not ſuffer it to be ſet up as a gift, becauſe contradictory to his own act; but that if grantor, meaning and intending a gift, inſerts a colourable conſideration, he himſelf ſhall not take advantage of it afterward, and ſay, it was not a gift: and here the plaintiff by letter under his

own

own hand desires that to be inserted. But I must take that to be only consistent with the rest of the evidence, that he, intending to make a conveyance for a sham qualification in lieu of the conveyance of the first estate which had been afterward sold, makes this colourable conveyance for the same purpose, but still upon the same ground that the first conveyance was; and therefore still the tenant in possession swears, he never delivered possession to *Green*, but paid rent to the plaintiff as before. Hence then it appears, that the conveyance was made on this colour and pretence. He takes advantage of it now to set it up as an absolute gift; which does not really appear to be intended nor a real consideration: but considering the transaction, and the manner of dividing this money without any colour or pretence of consideration as to the other defendants, it shews, they divided his property, as they pleased, without any intention of gift. Under all these circumstances it is impossible to let this conveyance stand; and I never saw a more barefaced and shameful transaction. It is said, this has been tried, and the jury have found it to be a gift; but the jury could find no otherwise, they could not enter into the consideration to set it aside for fraud, and therefore found for the defendant at law. I must then set aside all this transaction, and direct the defendants to account for and repay this money so received, as obtained and divided without any consideration and by imposition; and must charge them all with the whole, all being combined together.

The plaintiff objected to reading the deposition of *Lock* on the part of *Green*.

Lord Chancellor said, he would read it, if he could: but it could not be done. It has often been a question, whether *particeps fraudis* should be read or not; and sometimes the boundaries have been pretty nice. If he was concerned as an attorney and trustee, he has been read, and it has gone to his credit only, though not to his competency; but here he is directly charged as guilty of the whole, and not only that, but as interested: for here he is a trustee for a considerable sum given to his son, which I must consider as given to himself: otherwise all frauds would be easily covered; beside he is interested as to the setting aside the two notes.

Evidence of co-defendant *particeps fraudis* and interested, not allowed.
If only as attorney and trustee, it goes to his credit only.
See Amb. 592.

Anonymous, *July* 9, 1755. Case 218.

At the Rolls.

ON a bill for specifick performance of an agreement to let the plaintiff into a trade, *His Honour* said, he never knew an instance, that the court decreed an account of the profits of that

On decreeing performance of agreement to let into trade, an account back

of the profits not decreed: but infant, whose truſt money is laid out in trade, has an option.

that trade from the time the plaintiff ought to be let in, as was now deſired. Where a truſtee has money of an infant to lay out in the funds for the infant's benefit, and lays it out in trade, which produces 10*l. per cent.* the court will give that infant an option either to have intereſt for the money or the profits of the trade: but that is a very ſingular inſtance, and the only one of that kind, and he knew it done in the caſe of a brewhouſe. The court would not decree performance of an agreement for letting the plaintiff into a trade, and then decree damages for the plaintiff for delay in not letting him in ſooner; for that the plaintiff might have had, if he had uſed his remedy at law.

Caſe 219. Anonymous, *July* 12, 1755.

Injunction. Bill by principal debtor for injunction being diſmiſſed, the bail cannot bring another taking up the ſame equity: unleſs for colluſion.

A Bill by the principal debtor to ſtay proceedings in action at law being diſmiſſed, the bail brought another bill for the like injunction.

Lord Chancellor, upon ſhewing cauſe againſt diſſolving the injunction, ſaid, that where the equity was determined as to the principal by diſmiſſion of his bill either on hearing or for want of proſecution; he never knew an inſtance of a new bill by the bail to the action taking up that equity; which would be moſt dangerous to admit. The common method of proceeding is, where the principal brings a bill againſt an action at law, and injunction being granted, it is a motion of courſe notwithſtanding the injunction, to proceed to make the bail liable. If the doctrine now inſiſted upon is true, it would be neceſſary to make the bail party to that bill; for it is now ſaid, that the bail is not bound in that ſuit. If ſo, and if other perſons are allowed to ſet up the equity again, and overhawl the whole matter, injunctions to ſtay proceedings at law would never be at an end, and the plaintiff at law might never come at his right, or at leaſt could not get out execution until after a great number of years; and it would be neceſſary to have an act of parliament againſt the power of this court to grant injunctions. But notwithſtanding this, if there is colluſion, or a charge in the bill of colluſion, between the principal (defendant at law) and the plaintiff at law, and the injunction is diſſolved by colluſion in order to charge the bail at law, the bail might take up the equity, and it would be then a new equity; for fraud and colluſion affect every thing, and would give a right to reſort to the original equity: but in this caſe there is no pretence of it, therefore diſſolve the injunction abſolutely.

Anonymous,

Anonymous, *Ibid.*

Case 220.

THE plaintiff having lain by a conſiderable time after anſwer, and then an order being obtained to refer the anſwer for impertinance, *Lord Chancellor* diſcharged that order, comparing it to the rule as to exceptions, where not brought in in two terms; there being no rule as to the time for referring an anſwer for impertinence, which is diſcretionary in the court. But a bill cannot be referred for impertinence after anſwer, nay after ſubmitting to anſwer, as by praying time, &c. though for ſcandal a bill may be referred at any time.

Bill referred for ſcandal at any time; for impertinence not after anſwer or ſubmitting to anſwer. Referring anſwer diſcretionary.

Hinton *verſus* Hinton, *July*. 14, 1755.

Case 221.

HUSBAND, copyholder for life of an eſtate in which by the cuſtom of the manor his widow was intitled to *free bench*, when in gaol enters into an agreement for valuable conſideration for the ſale of that eſtate to his ſon, but dies without executing the agreement before actual ſurrender of the copyhold and the paſſing the legal eſtate to the ſon, who brought this bill for ſpecifick performance of the agreement, and that to the excluſion of the widow's cuſtomary *free bench*.

Poſt, July 16. Copyholder contracts for valuable conſideration to ſell to his ſon, and dies before actual ſurrender; the ſon is intitled to performance, and to compel the widow to ſurrender free bench.

For plaintiff. Such an agreement is an alienation of the huſband's eſtate ſo as not to intitle the widow at the time of his death to her *free bench*; which can only be of ſuch copyhold lands whereof her huſband died ſeiſed, and not like dower at common law, which is a right in the widow in ſuch lands as the huſband was ſeiſed of during the coverture, and therefore by the marriage the wife gains an inchoate right to dower, which the huſband cannot defeat without her levying a fine, and then not without her conſent; which is not the caſe of *free bench*, for the huſband by parting with the eſtate during the coverture prevents that right; and his widow therefore derives from him, as ſhe was in his power. This is not like the death of a jointenant; in which caſe the ſurvivor is in by his original right, which cannot be prejudiced by a will. Here was no original right; her right not taking place until the huſband's death, and depending on his acts, who may alien either in law or equity. It is like the right of a bond-creditor, who has a lien upon all the lands, of which the debtor dies ſeiſed, but the debtor may at any time during his life alien that land; and if ſuch debtor articles to convey his eſtate, that will take away the right of the bond-creditor, for it is the eſtate of another; and there may be a ſeverance of jointenancy by articles in equity or equitable conveyance;

veyance. A fair judgment creditor of one, who has articled for ſale of the eſtate is poſtponed to the purchaſer; an agreement for ſale for valuable conſideration being conſidered to all intents in this court as an actual ſale, and the huſband as truſtee for the other from the time it ought to have been executed.

For defendant. They, who claim under the perſon entering into an agreement for conveyance of an eſtate may be bound thereby, as an heir at law, *&c.* but the defendant comes in in another right, by virtue of the cuſtom. She has an initiate right by marriage, if ſhe ſurvives the huſband, and he dies ſeiſed; and then if not legally defeated, the queſtion is, whether this court will carry that equitable lien into execution againſt one claiming in another right. If tenant in tail enters into a contract for ſale of the land, he may bar by fine or recovery, yet if he does not do it in his life, but ſuffers himſelf to lye in gaol, it has been held in this court, that it ſhall not be carried into execution againſt the iſſue in tail and remainder. So if tenant in tail contracts for ſale of timber, for all actually cut down in his life, the contract will be ſo far good, but not for the reſt, though a tree happens to be half cut down; for it muſt be done in his life; and ſo it is as to tenant for life without impeachment of waſte, who makes a contract for the ſale of timber. But *Muſgrave* v. *Daſhwood*, 2 *Ver.* is in point. Therefore although, where huſband is ſeiſed as truſtee, the widow cannot claim either dower or *free bench* againſt *ceſtuy que truſt*, this is not that caſe; for ſhe had a right before. *Free bench* or copyhold is *ſub modo* as much the right of the widow as dower. Huſband committing felony bars not right of dower, or if huſband with his wife enter into agreement to levy a fine, and he receives the money thereon; but dies before ſuch conveyance is made, that will not bar dower.

LORD CHANCELLOR.

There are two queſtions. Firſt, where a copyholder for life with a cuſtomary widow's eſtate, entering into an agreement for valuable conſideration for ſale of that eſtate, dies without executing that agreement, and without making that ſurrender and paſſing the legal eſtate, and the widow ſurvives, whether the purchaſer of that eſtate by ſuch agreement in equity is intitled in a court of equity to have a ſpecifick performance not only againſt the repreſentative of the huſband, but againſt the wife ſo as to exclude that *free bench* or that cuſtomary eſtate, ſhe would be otherwiſe intitled to? Next, ſuppoſing there may be ſuch a caſe, and the court would carry it into execution, whether in the preſent caſe there is ſufficient proof, of what this agreement was, to warrant a court of equity to carry it into execution?

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As to the firſt there might originally be ſome difficulty: but notwithſtanding *Muſgrave* v. *Daſhwood* I think, taking it as a general propoſition, this court might do it. Copyhold eſtates are liable to agreements and truſts to be declared on them, as freeholds are; and therefore notwithſtanding that general reaſon as to the Lord's fine (in 2 *Ver.* 63.) it has been often determined, that if a copyholder enters into an agreement for ſale, and dies before ſurrender, or makes a ſurrender, and dies before preſentment (which makes that ſurrender void) this court will decree that, being for valuable conſideration, to be carried into ſpecifick performance againſt the heir or voluntary claimant ſtanding in place of that copyholder. That was particularly the caſe of *Taylor* v. *Wheeler*, (2 *Ver.* 564.) which underwent a good deal of conſideration, and is often cited, but cited on another head, to ſhew that aſſignees under a commiſſion of bankruptcy take the bankrupt's eſtate bound by all the equity, to which the eſtate was liable in the hands of the bankrupt; which has been ſo ſettled ever ſince. As it would be ſo againſt aſſignees under a commiſſion of bankruptcy, and againſt heir at law of the copyholder, or any perſon intitled to the benefit of the life-eſtate as ſpecial occupant during life of the bankrupt, the queſtion then is as to the widow, by reaſon of *free bench*, and whether ſhe is in the like caſe of ſuch aſſignees, or heir, or perſon claiming voluntarily under the copyholder? It is inſiſted for the plaintiff, that ſhe is, becauſe *free bench* differs from dower at common law, as it is a right the widow has upon death of her huſband of ſuch copyhold lands, whereof her huſband dies ſeiſed; that is the cuſtom: whereas dower is a right, in the widow of ſuch lands, as the huſband is ſeiſed of during the coverture, and therefore by marriage the wife gains an inchoate right to dower, which the huſband cannot defeat without her levying a fine, and therefore not without her conſent: which is not the caſe of *free bench*, for that the huſband by parting with the eſtate during coverture prevents that right, and therefore the widow derives from her huſband, as ſhe was in his power. Now that is a mixed queſtion: ſhe does ſo far take from the huſband, that her widow's eſtate is in the power of the huſband to deprive her of, if he ſurrenders fairly during the coverture: but it is a right ariſing from the cuſtom of the manor, and that is a reaſon, that breaks in a little upon the other part, for the cuſtom of the manor is the ground of the right. But yet there are ſeveral caſes, in which this court would take the benefit of it from her, notwithſtanding ſhe had the benefit of it at law; and therefore it is admitted, that if the huſband is ſeiſed only as truſtee, as if another perſon purchaſed a copyhold eſtate for lives or in fee in name of the huſband, and paid the purchaſe-money, if the wife claimed *free bench*, this court would prevent her claiming it againſt *ceſtuy que truſt*, becauſe he was owner in equity of the eſtate; and in this it

Coyhold as freehold, liable to agreements and truſts.

Bankrupts. Aſſignees take the eſtate bound by all equity.

Free bench differs from dower: but ariſes from the cuſtom of the manor.

Truſtee cannot claim either.

does not differ from dower at common law; for if husband is seised merely as trustee, the wife would be intitled to dower at law, but this court would not suffer her to take advantage of it; because it would be taking part of that estate, the whole of which was in another, and against conscience. This is not a trust declared, but a trust of construction of this court; that is, where a contract for purchase of an estate whether freehold or copyhold, and vendor dies before conveyance of the legal estate by surrender (as it is in this case) if the contract is performed on the part of the purchaser, or if he has done all that is necessary on his part, the court considers things contracted to be done for valuable consideration, as done, and considers the other as trustee from the time he ought to have performed. That goes a great way to this point: the principal case against this is that of the issue in tail and remainder; and it is truly said, that if a man, seised of an estate tail with or without remainder over, contracts for sale, and receives the purchase money, and dies in the first case without levying a fine, or without a recovery in the last case, this court would not carry into execution against the issue in tail; as was the case of Mr. *Savil* of *Medley*, who when tenant in tail chose rather to live in gaol, and be served in plate there, than to perform his agreement: but the ground of that is, the issue in tail in the one case or remainder man in the other claim *per formam doni* from the creator or author of the estate tail, and therefore though in the power of tenant in tail to be barred by a particular conveyance, that not being done, the court cannot take away that right they derive not from the tenant in tail, but from the author: that is a different ground. If therefore it had not been for the case of *Musgrave* v. *Dashwood*, I should have but very little doubt to determine this case. The ground there, that the widow's estate was not to be considered as an incumbrance, must be, that it was not created by the husband. I do not understand that part of the case, where the book says, the court of law was divided; I do not see, how that could come in question in a court of law; nor do I see, how the lord was concerned as to the fine in that case, where the bill was dismissed; for that does not at all seem to be a reason to support it. If the articles were such, as amounted there to a severance of the jointenancy in equity, in such case this court would decree against the survivor. But I should not think that authority sufficient to determine this, if this case rested upon that; for where it is a clear case for valuable consideration, the court might do it. But the nature of this agreement makes the doubt. The court would expect it should most clearly appear, what were the terms of that agreement; that it should be certain, plain, and fair in all respects. Then considering the agreement before me, I cannot say, that appears; I do not know, what it was; and in order to carry into execution the terms thereof must appear. The agreement was entered into between father and son while

Agreements not carried into execution against issue in tail or remainder, claiming *per formam doni*.

while the father was in gaol: that is an objection, unleſs it is cleared up. I have no doubt, but a man might make ſuch an agreement in gaol: but it muſt be having proper aſſiſtance and advice and in a fair manner. Courts of law will of courſe ſet aſide on motion warrants of attorney, unleſs of an attorney attending on his part, of his own procuring, employed by himſelf, and not procured by the perſon taking the warrant of attorney; which is a very prudent and cautious rule, and a good rule for this court to go by. How that was, does not appear in the preſent caſe. No conſideration is mentioned in the letter of attorney; it is only for divers good cauſes and conſiderations him thereunto moving. That may, as it is ſaid, let into proof; but in this caſe of a ſpecifick performance the court expects the whole to be in writing in ſome way or other. It is ſaid, the real conſideration was, that the ſon was to undertake to pay debts of the father: but there is no proof of that to my ſatisfaction, nor what debts he was to pay, nor reduced to any kind of certainty. Then in a caſe ſo circumſtanced, of an agreement from a father while in gaol, and in a caſe doubtful of itſelf, and where there is this authority, it is too hard, and the agreement does not appear with ſufficient certainty to decree it.

For plaintiff. Further proof was then read to ſhew a conſideration paid; whereupon *His Lordſhip* ſaid, it was then reduced to that queſtion, whether, taking it to be an agreement for valuable conſideration and performed on the part of the purchaſer, it could be againſt the widow; which was very material, and he muſt take care of the precedent; therefore ordered it to ſtand over, and he would look into the regiſter's book in that caſe of *Muſgrave* v. *Daſhwood*.

ſee post. 638.

Mathews *verſus* Mathews, *July* 15. 1755. Caſe 222.

Maſter of the Rolls for Lord Chancellor.

ADMIRAL *Mathews* had upon his marriage a real eſtate of 300 *l. per ann.* in ſtrict ſettlement, ſo as to make his firſt ſon tenant in tail. Long afterward he enters into a deed in 1733. which is an agreement between the father and ſon upon the ſon's marriage, whereby the father agrees to take 800 *l.* part of the fortune of the ſon's wife, and to make a ſettlement in this way; that in conſideration of the 800 *l.* he ſhall in one month afterward convey to truſtees for a term of years lands ſubject to theſe truſts, to ſecure 50 *l. per ann.* to the ſon, and 800 *l.* to the younger children of the ſon to be paid at ſuch days, times, manners, and proportions, as *Thomas Mathews* the ſon ſhould direct and appoint, and for want of appointment to be paid to them equally at twenty-one or marriage, with benefit

Debtor deviſes a much larger legacy upon a condition, which by a ſubſequent deed it becomes impoſſible to perform; by the will it would not have been a ſatisfaction, as it was for another purpoſe; but being freed from

the condition by the deed, it is a ſatisfaction.

benefit of ſurvivor upon the death of any before; and if he had no child, the ſaid 800 *l.* ſhould not be raiſed, and the term ſhould attend the inheritance.

In 1749. he makes a will, and deviſes 700*l. per annum* to his ſon, upon condition that the ſon within twelve months after teſtator's death ſhould convey the whole family-eſtate for better ſecuring to the teſtator's ſiſter in law *Anne Burgeſs* 100 *l. per annum* for life, which he had before given her, out of the ſaid lands; with another condition that the ſon ſhould confirm his will, otherwiſe the 700*l.* annuity to ceaſe; and then makes a very large proviſion for the grandchildren at their age of twenty-five or marriage.

In 1750. the teſtator by a deed makes his ſon tenant for life inſtead of tenant in tail, as he was before, by levying a fine and reſettling that eſtate in the ſtricteſt ſettlement, and to no other uſes.

After his death the queſtion upon the preſent bill was, how far the claims of the ſon, his wife, and children, under the agreement in 1733, are barred by any other proviſion in the will of the father; and whether that is a ſatisfaction?

Sir *Thomas Clark.*

General rule, that a legacy, larger than or equal to a debt, is a conſtructive ſatisfaction; but any minute circumſtance is laid hold of to take it out of that; as it muſt be as certain as to the duration and commencement.

The deed in 1733. was a contract between father and ſon ſo as to make the ſon and his family purchaſers from the father, and created a debt owing from the father to them. As to the wife, ſhe has clearly received no ſatisfaction for that debt contracted to her. As to the children, the rules of ſatisfaction are well ſettled and known; and it is ſtrange, how that general rule came to be eſtabliſhed; that is, where a debtor by his will gives a larger or equal benefit, it is extraordinary to ſay, that, if the eſtate is ſufficient for both debt and bounty, the teſtator upon the rule of conſtructive ſatisfaction ſhould not intend both. However that rule has been ſo ſettled, and not broke in upon: yet the court diſlikes it ſo much as to lay hold of any minute circumſtance to take it out: as that the thing in ſatisfaction ſhould be as certain as to the duration and commencement of it, otherwiſe, though ten times larger given by the will, it will not be held a ſatisfaction. I remember a caſe before the *Lord Chancellor*, where an old lady indebted to a ſervant for wages, by will gave ten times as much, as ſhe owed, or was likely to owe; yet becauſe made payable in a month after her own death, ſo that the ſervant might not outlive the month, although great odds the other way, the court laid hold of that. By the articles in 1733, the children were intitled to 800 *l.* ſo as that every child muſt have had part of it. By the will he has given twenty times as much in the whole among them: but then it is ſo given them,

them that if they do not arrive at twenty-five years of age, or do not marry, they would be intitled to nothing. It falls not within the rules of ſatisfaction, to which the court has adhered; and it is too much to ſay, the children are not intitled to both.

Next as to the annuity of 50*l.* for life to the ſon, independent of the deed in 1750; what is given by the will is not a ſatisfaction of what is given by the deed in 1733. The teſtator has contracted a debt by the deed in 1733: it is contended, that the annuity given by the will is a ſatisfaction for that: but it is given by the will *diverſo intuitu*. It is the ſame, as if the teſtator had deviſed the ſettled eſtate to his ſon for life, *&c.* ſubject to the annuity to *Anne Burgeſs*; and then if the ſon had performed that condition, he would be intitled to claim under the deed in 1733. The court never carried the rule of ſatisfaction ſo far by conſtruction as to make that anſwer a double purpoſe. Suppoſe, a man gives a pecuniary legacy to his executor, and dies indebted to that executor, and no diſpoſition of the ſurplus of the perſonal eſtate; the queſtion was, whether the executor ſhould be intitled to the undiſpoſed reſidue; and, having a legacy by the will, by the common rule of the court he was barred: but it was inſiſted, that that legacy ſhould alſo bar his debt, which was leſs than his legacy: but the court would not let that operate for two purpoſes ſo as to make it pay the debt beſide. This caſe is ſimilar; for the teſtator has, upon condition that he will ſettle the family-eſtate, given him the 700*l.* annuity; and now it is contended to make that 700*l.* annuity pay a debt; the ſon upon performing the condition would be intitled to have recourſe to the payment of this debt under the deed in 1733. Thus if it ſtood on the will: but it is neceſſary to conſider the deed in 1750, and the force thereof upon this queſtion. The teſtator having by the will made an injunction upon the ſon, with which he might or might not comply; in 1750. they come to an agreement to levy a fine and ſettle the eſtate to the uſes and intents afterward with ſtrong negative words to no other. It is a new agreement, and it is truly ſaid, the will left it executory, and the teſtator executed this part of the will himſelf: but in what manner? Which decides the queſtion, how far the ſon is ſatisfied. They put the eſtate, which was the ſubject matter of that deed in 1750. out of the ſon's power to perform that condition annexed to the deviſe of the 700*l.* *per annum*, which the ſon might have done, when the will was made, being tenant in tail of that eſtate: but having got the ſon into this ſettlement, it was out of his power to ſecure that for the life of *Anne Burgeſs*, though he might grant *pour auter vie*, that is his own life. Then this ſhews a variation of intention by executing part of it in his life, and putting it in ſuch a way as if no ſuch proviſion as to the annuity of *Anne Burgeſs* had been in the will.

Legacy to executor excludes him from the undiſpoſed ſurplus; but is not at the ſame time a ſatisfaction for a debt.

The Rule of conſtructive ſatisfaction is not carried ſo far as to anſwer a double purpoſe.

will. This annuity of 700*l.* is by the deed in 1750. a pure annuity and free from the condition; and then it is the ſame, as if the condition compriſed in the will never had been mentioned; and if it had been pure and free, it would be a ſatisfaction of the 50*l. per annum*. By the deed in 1750. then it is within the general rule of ſatisfaction, though by the will it would not have been ſo.

N. His Honour mentioned a late caſe of *Sewel* v. *Clark*, where *Godfrey* a brewer had deviſed the produce of 10,000*l.* to his mother for her maintenance, and determined that that ſhould abate in proportion.

Caſe 223. Hinton *verſus* Hinton, *July* 16, 1755.

Ante, July 14. LORD CHANCELLOR gave judgment.

This caſe is now reduced to the firſt point. I inclined to be of opinion, that in ſuch a caſe of an agreement by a copyholder for a ſale to his ſon for valuable conſideration, paid as to the greateſt part at leaſt, the father dying before actual ſurrender, the purchaſer was intitled in a court of equity to carry that into execution, and to compel the widow, who by the cuſtom of the manor was intitled to *free bench* out of this eſtate, to ſurrender her right thereto in execution of this. The only doubt, I had, aroſe from *Muſgrave* v. *Daſhwood*, mentioned in two places in 2 *Ver.* 45 and 63, and ſo obſcurely reported there, that I deſired the regiſter's book, and looked into it; where it is entered in two places, and the days in *Ver.* appear to be right; but in neither of thoſe places is there in the Regiſter's book any ſtate of the pleadings or caſe; in the latter place is a common ſhort order of diſmiſſion; ſo that no ſtate and no light can be from thence. Then the authority of that caſe depends on the book, where it is ſo imperfectly ſtated, it is difficult to know the ground of it; for it might be only a bare contract for ſale, the day for ſurrender not being come, nor any money paid by the purchaſer: that might be a ground for a difference, for then vendor was not become truſtee for vendee in that caſe, for it was to be performed until the death of the huſband. That authority then cannot have weight to govern my judgment; and I muſt conſider it upon the reaſon of the thing and other authorities. No other authority can be found; and therefore it is deveſted of any determination to conclude the judgment of the court; and therefore I have looked into caſes at common law upon imperfect conveyances by huſband, and left ſo at his death, have been made as to *free bench* of the wife upon ſuch a conveyance. Some are very relative to the

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ſents, and the analogy and reaſon thereof will go a great way; for it is a general rule, that *equitas ſequitur legem*. The firſt authority is only a general one to ſhew the nature of the wife's eſtate; *Rennington v. Cole*, *Noy* 29. the ground of which was, that the *free bench* eſtate of the wife is but a branch out of the eſtate of the huſband; and other caſes ſhew, that in events it is in the power of the huſband. Another caſe in 1 *Inſt.* 59. *b.* goes a good way in this; which is a very ſtrong caſe, that a ſurrender barely to uſe of a will, the uſe of the copyhold lands directed by the will, and no preſentment until after death of ſurrenderor, ſurrenderee ſhall take the lands in preference to the ſurviving jointenant, the ſurrender though no preſentment being a ſeverance of the jointure: which is a ſtrong ſupport of the determination of *C. B.* in *Carr* v. *Singer*, cited by me the other day, that a ſurrender to uſe of a will will bar an eſtate tail of a copyhold; for if ſuch a ſurrender, though not preſented until after death of the jointenant, will ſever the jointure, (the objection to which was, that the will took place but at the death) though the eſtate tail and the uſe by the will are to take effect at the ſame time, yet it ſhould bar the intail; that goes a great way to the preſent caſe. Another caſe is *Benſon* v. *Scot*, *Sal.* 185. where there was a ſurrender by the huſband, the conveyance imperfect at his death for want of preſentment, that preſentment was made after his death, and held to bar the *free bench*. Another caſe is in *Freem.* 516. For want of authorities and precedents in this court, I have cited theſe at common law to ſhew how far and to what degree courts of law have conſidered *free bench* in the power of the huſband. This is clear; that where the huſband dies, having made an imperfect conveyance, that is held compleated after his death, and to exclude *free bench*; which ſhews, how much they held it in power of the huſband. Then conſider, how far the reaſon of that goes in a court of equity. The huſband has for valuable conſideration contracted to ſell the whole of this eſtate, all that was in his power in it; he had an intereſt in it for his life, and a contingent intereſt to diſpoſe of that right of his wife; and the queſtion is, whether analogous to thoſe determinations at law ſhe ſhould be bound by this act? I am of opinion, it is ſo; for it is parting with the whole eſtate in equity; and this court conſiders the thing as done, from the time it ought; conſiders vendor as truſtee for vendee; and that they, who come in his place, ought to perform that. The only objection to that was from analogy to caſes of iſſue in tail, who claim *paramount* and *per formam doni*; which is compared to this, that here the widow claims not under the huſband, but from the cuſtom of the manor, and therefore ſomething diſtinct from the huſband. But the determinations at common law go not upon that at all; for according to that caſe, that *free bench* is a branch of the eſtate of the huſband, it ariſes from the eſtate of the huſband, though it is from the cuſtom of the manor; and you might argue in that way

Ante, in Moor v. Moor.

way as well in *Borough Engliſh*, wherein lands deſcend to the youngeſt ſon; and yet if the father in his life contracts only to carry into execution, the youngeſt ſon is as much bound to carry that into execution as cuſtomary heir, as much as the heir at common law. Nay that youngeſt ſon ſhall be obliged to ſurrender the copyhold lands, and the conſideration-money to be paid for them ſhall go to the father's perſonal eſtate, not to him: yet it might be ſaid, that ſon claims not from his father, but by the cuſtom of the manor. This is very near that caſe, though not quite; for courts of law and equity conſider that cuſtom only as directing the derivation of that out of the huſband's eſtate.

I am of opinion therefore, that the defendant is under the circumſtances of this caſe bound to ſurrender her widow's eſtate in theſe copyhold lands to the plaintiff at his expence in performance of her huſband's agreement: but without coſts.

Caſe 224. Alexander *verſus* Alexander, *July* 17, 1755.

Maſter of the Rolls for Lord Chancellor.

Power to appoint among children; each muſt have a part, not illuſory, nor reverſionary: but a particular intereſt, as for life, may be given to one. But not to grand children; nor can a diſcretion be given to another to appoint. But though that would be void, it would not devolve on the court, which is only where the power is well created, but by accident cannot be executed by the party. Where given to thoſe not

JAMES ALEXANDER by will bequeaths to two truſtees 6,000*l.* deſcribing particularly the funds of which it conſiſted, upon truſt to pay the intereſt and produce to his wife for life, and directs them to place the ſame out at intereſt with her conſent; "and I give unto my ſaid wife the abſolute diſpoſal of the ſaid ſum of 6,000*l.* unto and among ſuch children begotten between us, and in ſuch proportion, as ſhe ſhall by laſt will and teſtament, or by any other deed or deeds, writing or writings, to be executed by her in her life-time, atteſted by two or more credible witneſſes, direct, limit, and appoint;" then directs the truſtees to pay the ſame according to ſuch will or appointment; and for want of ſuch will or appointment, that the ſaid 6,000*l.* ſhould fall into and go in the ſame manner as the reſidue of his perſonal eſtate: but if his wife ſhould think fit to apply in her life-time any part of the ſaid 6,000*l.* as an increaſe of any of the portions given by the will to his ſaid children, or any of them, for their better advancement in marriage or otherwiſe in the world, then the truſtees ſhould out of the ſaid 6,000*l.* iſſue and pay ſuch part thereof for the benefit of ſuch children, as his wife ſhould by any writing as aforeſaid direct and appoint.

The mother makes her will, there being then five of the children living, ſhe thereby recites her power, and in purſuance thereof gives to her daughter *Anne* 100*l.* to be paid out of the ſum of 5,390*l.* which ſhe computed to be the only remaining ſum

ſum of the 6,000*l.* after deducting what ſhe had before paid to ſome of her children; and as to the remaining produce after payment of the ſaid 1000*l.* ſhe diſpoſes to her daughter *Mary* and ſon *James* for their own reſpective uſe each one full fourth part thereof (the whole into four parts equally to be divided), and to the ſaid *Mary* and *James* alſo the other remaining two-fourth parts; but as to thoſe two-fourth parts upon the truſts following; *viz.* as to one of the ſame to place out or continue on ſecurities during the life of their ſiſter, her daughter *Catherine*, wife of *Thomas Clipperton*, and to pay the intereſt thereof to ſuch perſon or perſons and for ſuch purpoſes as ſhe ſhall from time to time direct, and in default of ſuch direction into her own proper hands, my will being that ſuch intereſt ſhall be for her ſeparate uſe and diſpoſal, and not ſubject to the debts, controul, or engagements of her preſent or any future huſband; and upon truſt at her deceaſe to pay and apply the principal of ſuch fourth part to ſuch child or children, if any, as ſhe ſhall happen to have living at her deceaſe, in ſuch manner as ſhe ſhall by writing under her hand in nature of a will or otherwiſe appoint; and, for want of ſuch appointment, to ſuch child, if but one, if more to them equally; in default of ſuch child or children the principal of ſuch fourth part, if ſhe ſurvives her huſband, to be wholely paid to her for her only uſe and benefit; but if ſhe dies in his life, the ſaid principal at her deceaſe to go to the ſaid *James* and *Mary*, yet for their own reſpective benefit only as for one-third part thereof to each of them; and as to the other third part thereof, and alſo as the other of ſuch remaining two-fourth parts, whereof no diſpoſition is herein yet made, upon truſt to pay and apply the principal and intereſt thereof or any part of either from time to time weekly or otherwiſe in ſuch manner as ſaid *Mary* and *James*, their executors, adminiſtrators, or aſſigns ſhall in their diſcretion think moſt beneficial for the perſonal ſupport and maintenance of their brother, my ſon *Francis*, and his wife and children, but not for the payment of his debts.

capable, the other capable takes the whole.

It cannot be given exempt from debts of appointee.

Sir *Thomas Clarke* ſaid, there were ſome particularities in the caſe, and he would conſider of it, and next day delivered his opinion.

Court's judgment.

Conſidering the nature of the power, the wife was confined as to the objects to give it to, but left to her diſcretion as to apportioning it among them. In conſequence of this ſhe was obliged to give the whole among the children; every child muſt have ſome; ſuch ſhare as ſhe pleaſed, provided not illuſory; which has been the language of the court as to ſuch appointments. If then ſhe might apportion, as ſhe pleaſed, it is neceſſarily implied in that, that ſhe might apportion it out in ſuch manner, as ſhe

pleaſed; for it is ſuch kind of proportions, as ſhe ſhould think fit; and therefore the power in the firſt part of the will does not differ from the latter part, where the word *manner* is added; for the firſt part means kind of proportions. This is the nature of the power; conſequently ſhe might give an intereſt for life in a particular ſhare to one child, or limit the capital of the ſame ſhare to another, or even go ſo far as to limit it to a third child upon a contingency; provided ſhe doled out the whole in this various way among all the children only. One reſtriction ſhe was under, that ſhe could not have given any one child merely a reverſionary intereſt; for it was intended as a proviſion, and therefore it would be deemed illuſory. The power did not require that ſhe ſhould dole it out in groſs ſums, and give each child an abſolute intereſt in that groſs ſum; for which among ſeveral other caſes *Thwaytes* v. *Day* 2 *Ver.* 80. is a ſtrong authority, that ſuch a power will enable the giving particular intereſts and to apportion ſuch intereſt, as a general power of apportioning land itſelf would. As this is neceſſarily implied, there is nothing in the objection, that where this is deſigned, the power is more extenſive, and words added.

As this is the nature of the power, conſider what is done under it. It is obſervable, that in conſequence of the nature of the power the mother has given to each of the five children then alive a ſhare in poſſeſſion, not merely a reverſionary intereſt; which I ſhould have doubted, whether it would be good. The 100*l.* to *Anne*, and the one-fourth of the reſidue to *James*, and the other fourth to *Mary* abſolutely, are undoubtedly good; ſo is the intereſt to *Catherine* for life in the other fourth part; and the giving it to her ſeparate uſe is ſo far from being an objection, that it is more ſtrictly carrying into execution the will of the father, a ſtronger execution of the power agreeably to his intent. But next the proviſion for the children of *Catherine* is not a good appointment. The mother had a power to do ſomething ſimilar to this, but in another way; for though that power would have enabled her for better advancement in marriage to make a ſtrict ſettlement, that is implicitly contained in that power to limit any ſhare, ſhe thought fit to give for advancement of marriage, in that way, but ſhe has not taken that method; for ſhe has made a diſpoſition of it by her will, and therefore it muſt correſpond with every circumſtance in that will. No caſe will, under a power to appoint to children, warrant to give to grand-children; there is a caſe in point to that, if it needed it, in *Vernon*: but it clearly cannot. *Thwaytes* v. *Day* is more like an authority on that ſide of the queſtion; but that is no authority to contradict the reaſon of the thing, that the appointment to the children is bad. Next,

as to the contingent intereſt to *Catherine* if ſhe had no children and ſhe ſurvived her huſband; but in default thereof two-thirds to *James* and *Mary*, the other third to go over with the other fourth to *Francis*; ſuppoſe *Catherine* leaves children at the time of her death, it is impoſſible, any of theſe limitations over ſhould take effect; it will fall into the reſidue, becauſe it was no appointment, being only a partial appointment of that fourth, given only to *Catherine* for life; and the children, though they could not take themſelves, would yet prevent the limitation over. But the moſt material limitation is that given laſt to *Francis*, his wife and children. Conſider the effect of this appointment: firſt on a ſuppoſition that this diſcretionary power was good, and had been exerciſed by *James* and *Mary*. It is clear, they could not have duly exerciſed that power without giving a ſhare to the wife and children of *Francis*; otherwiſe it is not conſiſtent with the mother's intent; nor can I ſay, they could diſcreetly have given the whole to *Francis*; and it is clear, that if they had exerciſed this power to the wife and children, it would have been bad. If they had given any thing (as they muſt ſomething in conſequence of their power), it would have been giving ſo much contrary to the intent and effect of the power: but I am clearly of opinion, this diſcretionary power was not good; becauſe if there is a power to *A.* of perſonal truſt or confidence, to exerciſe his judgment and diſcretion, *A.* cannot ſay this money ſhall be appointed by the diſcretion of *B.* for *delegatus non poteſt delegare*. It was determined by *Lord Chancellor* in *Attorney General* v. *Berryman*, *Feb.* 11, 1752; where a perſonal eſtate was given to ſuch charitable uſe, as one Dr. *Berryman* ſhould appoint; he directed the money to be applied, as another Dr. *Berryman* his brother ſhould appoint; which the court would not allow. Next conſider the conſequence of this: if the power could not be exerciſed, will it devolve on the court? It clearly cannot; for powers devolving on the court are powers well created in the original, but ſuch as by accident, as the death of perſons, cannot be executed by thoſe perſons; there is a natural ſubſtitution of the court in the room of thoſe perſons. But if a power is void in the original, there is nothing to devolve on the court. It is the ſame as if the mother had given it herſelf indefinitely for the benefit of *Francis*, his wife and children, laying the diſcretionary power out of the caſe, as if never inſerted in the will; and certainly ſo far as the wife and children were to have the benefit of it, that would not be good. No body could ſay, how much the wife and children were intitled to, becauſe it is given indefinitely. Had it been free from that circumſtance of uncertainty, how much each was to take, it would be void as to the wife and children juſt as that given to *Catherine*. Suppoſe ſhe had given

it

it to the huſband, his wife, and children, in groſs ſums abſolutely, equally to be divided, that would have been bad and an exceſs of her power; and if it had been ſuch a partial appointment, ſo far as void it would have fallen into the reſidue. The material queſtion then is as to the conſequence of this; whether the wife and children being incapable of taking will carry the whole to *Francis*, or whether the whole will go over, or whether any *medium* can be found out? It is ſaid to carry the whole to *Francis*; becauſe the execution of a power may be good in part and bad in part; and that even at law an irregular execution of a power will be ſupported, and not amount to no execution at all; and that in many caſes only the exceſs of a power will be void, the reſidue good. All that I admit; firſt that the execution of a power may be good and bad in part: but the conſequence of this will be various, as the circumſtances of the caſes are. As ſuppoſe a power to a man to appoint 1,000*l.* among his children; he appoints 100*l.* among the children, and 900*l.* among others who are ſtrangers; the appointment of the 900*l.* will be ſo abſolutely void, as that it will not be prevented from going over, if limited over for want of appointment, as if he had made none; and ſomething of this has happened in this caſe, or may happen, as to *Catherine*. On the other hand if the father gives the whole 1,000*l.* to his children, and annexes a condition, that they ſhall releaſe a debt owing to them, or pay money over, the appointment of 1,000*l.* would be abſolute; and the condition would be only void; and the boundaries between the exceſs and proper execution are preciſe and apparent. The ground and principle of all this is, that where there is a compleat execution of a power, and ſomething *ex abundanti* added, which is improper, there the execution ſhall be good, and only the exceſs void: but where not a compleat execution of a power, or where the boundaries between the exceſs and execution are not diſtinguiſhable, it will be bad. Suppoſe, one has power to jointure a wife for life, and appoints to her for 99 years, if ſhe ſo long live, as in the caſe of Mr. *Newport*, at law it was held in *B. R.* to be void, but in equity good *pro tanto*; becauſe he has done leſs than his power, and it clearly appears how much leſs the boundaries are clear and diſtinguiſhable; if the wife ſhould outlive the 99 years, the eſtate as to the reſidue of her life will be undiſpoſed, and will go over to the remainder or other perſon intitled. Now to put a caſe *vice verſa*, ſuppoſe a power to leaſe for twenty-one years, and he leaſes for forty; that ſhall be good for the twenty-one, becauſe it is a compleat execution of the power, and it appears, how much he has exceeded it. If the court can ſee the boundaries, it will be good for the execution of the power, and void as to the exceſs. Now is this appointment for benefit of *Francis*, his wife, and children, a compleat execution as to *Francis*? (for that is contended for.)

Power may be good and bad in part, and the exceſs only void; where the execution is compleat, and the bounds between it and the exceſs clear.

I think

I think certainly not; for the wife and children were to have ſomething, and ſo far as ſomething is deſigned for them it is bad, and no poſſibility to diſtinguiſh how much ſhe has exceeded the power; it falls therefore within neither of thoſe circumſtances, which are eſſentially neceſſary. But it is proper to conſider if there is no other way to make this good; becauſe the court will ſtrongly lean in favour of that ſide, if it can. I own, I incline to think there is a method: ſuppoſe the mother, inſtead of uſing the words ſhe has, had given this one-fourth to be applied in ſuch way as moſt beneficial for her ſon and his wife and children, if they ſhall by law be capable; I ſhould not have doubted, but that as the wife and children are not by law capable, it would be abſolute to *Francis*; and the queſtion is, whether there is any difference? This bears an analogy, to what the diſpoſition by the mother would be, if ſhe had given it to a ſon by name, who never appeared to have exiſtence, or was never capable of taking; if given to theſe four indefinitely, and three were incapable of taking, the fourth would have the whole, muſt take ſuch, as the others were incapable of taking. It falls within the reaſon of the late caſe of *Humphries* v. *Taylour*; where a perſonal eſtate was given to two in jointenancy; one was outlawed; and therefore the teſtatrix made a codicil, whereby ſhe adeemed what was given to one of the two; the queſtion was, whether the other jointenant ſhould take only a moiety? But the court held, he was to take what the other did not, they were to take the whole between them. The mother never deſigned, this fourth part ſhould fall into the reſidue; and it would be extremely hard that it ſhould. Then he will be intitled to the whole of that. As to the ſubſequent reſtraint, that it ſhould be exempt from debts, ſhe has there exceeded the power given by the law, as in the other caſe ſhe exceeded the power given by her huſband; for it will be left to take the fate of being his property, and ſubject to become at as his creditors ſhall think fit.

One joint-legatee being outlawed, a codicil adeems his ſhare, the other takes the whole.

I declare therefore, that the execution of the power, ſo far as it concerns other perſons than the children of the teſtator, is void and of no effect.

Note; At the bar was cited the caſe of Lord *Conway*, who, having power to grant leaſes of his eſtate, by one inſtrument, granted ſeveral; ſome of which were not within the power; and tho' all were within the ſame inſtrument, they were conſidered as ſeveral leaſes, and it was ſent to the Maſter to ſeparate them.

Alſo the *Dean and Chapter of St. Paul's* caſe, to ſhew that where a power exceeded is void at law in the whole,

this court will hold it good as an agreement, and direct a ſpecifick performance, reſtraining the contract according to the power; as was done there.

Caſe 225. Garth *verſus* Baldwin, *July* 18, 1755.

Deviſe of real and perſonal in truſt for *A.* for life, afterward for *B.* for life, and afterward for heirs of his body; afterward for the other ſons of *A.* ſucceſſively in tail, taking teſtator's name; then for the daughters in tail; for want of ſuch iſſue to convey to *C.* in fee. *B.* is intitled to a conveyance in tail of the real, and to the abſolute property of the perſonal. The intent being at leaſt doubtful, the legal operation of the words cannot be taken away. And as to the perſonal, it veſts abſolutely by this limitation whether ſo intended or not.

EDWARD TURNER in 1736 deviſes all his real and perſonal eſtate whatſoever and whereſoever ſubject to annuities and legacies, and all eſtate, right, title, and intereſt in law and equity, "to *Charles Baldwin* in truſt to pay the rents and profits of the real and profits of the perſonal, to my couſin *Sarah Garth* to her ſeparate uſe for life, and as if ſole and unmarried; and after her death to pay the ſame to *Edward Turner Garth* her ſon for life; and afterwards to pay the ſame to the heirs of his body; and for want of ſuch iſſue to pay the ſame to all and every other ſon or ſons of the body of *Sarah Garth* begotten, or to be begotten, and the heirs of their bodies ſucceſſively, the eldeſt to be preferred in priority of birth; and for want of ſuch iſſue to all and every daughter and daughters of *Sarah Garth* and the heirs of their bodies reſpectively as tenants in common, not as jointenants; and for want of ſuch iſſue in truſt to convey all the real and perſonal eſtate to my couſin *Thomas Gore*, his heirs, executors, adminiſtrators, and aſſigns for ever, the bulk of my eſtate coming from his family;" with a direction that by act of parliament or otherwiſe, as ſhould be thought proper, all the ſons of *Sarah Garth* ſhould take upon them the name of *Turner*.

Sarah Garth never had any other ſon except *Edward Turner Garth*, but left alſo a daughter now an infant.

Edward Turner Garth having read an affidavit of his coming of age, brought on a petition to aſcertain his intereſt in this real and perſonal eſtate.

For Petitioner. Upon this queſtion, whether or no the petitioner is tenant in tail of the real, and abſolutely intereſted in the perſonal, eſtate, ſome difficulty may ariſe. As caſes of this nature often happen, it is of general conſequence to ſettle it on a reaſonable and juſt foundation. To effectuate as far as poſſible the intent of teſtator, courts of equity have carried the notion as to truſt eſtates farther than formerly: but care muſt be taken, that we do not for that reaſon loſe all rules of law and land-marks of property. To conſtrue this will according to rules eſtabliſhed upon the truſt as it concerns the real eſtate, the nature of the inſtrument and the words are to be conſidered. Nothing can be

inferred

inferred from the inſtrument to imply an intent to make a ſtrict ſettlement. A diſtinction is eſtabliſhed in ſeveral caſes, as in *Bale* v. *Coleman*, 1 *Will.* 142. that in articles on marriage the court will conſtrue *heirs of the body* or *iſſue* ſo as to carry into ſtrict ſettlement for the iſſue, who are purchaſers and upon the conſideration of marriage; the court, reſpecting the courſe of marriage-ſettlements, preſumes, that the parties in the articles mean to contract accordingly; and therefore an implication ariſes on the nature of the inſtrument; which fails in the conſtruction of a will, where all take under the bounty of teſtator, and the legal operation ſhall take effect. Next upon the words: it is only a limitation to *A.* for life, remainder to heirs of his body. In *King* v. *Melling* 1 *Ven.* all the judges admitted the legal operation would be to veſt the limitation in *A.* the firſt taker, but the doubt was as to *iſſue of the body*: but whatever debate it bore formerly, it is now ſettled, that whether it is to *heirs*, or *iſſue*, *of the body*, the firſt taker ſhould have it veſted in him, and that opinion of Lord *Hale* has been followed ever ſince. Though here an eſtate for life is expreſſed, the teſtator might as well mean an eſtate tail. Wherever an eſtate tail is given, an eſtate for life is impliedly given, the two limitations being connected together and looked on as an eſtate tail executed. If that then is the legal ſenſe, the only caſes, which varied, have been, where other words are ſuperadded, or a ſpecial deſignation, as *Burchett* v. *Durdant*, 2 *Ven.* 311. *Archer*'s caſe, 1 *Co.* 66. being an indication of intent that *heirs of the body* ſhall be a deſcription of the perſon as words of purchaſe; that intent is followed even in a court of law. So a direction not to alien may ſhew the intent of teſtator. Here no words of limitation are ſuperadded to thoſe, which always carried an eſtate tail. It is objected, that this being under a truſt the court muſt ſay, the teſtator intended only an eſtate for life: but the conſtruction of theſe words will be the ſame on a truſt as a legal eſtate, *Bale* v. *Coleman*; and admitted by *Your Lordſhip* in *Bagſhaw* v. *Spencer*, 12 *Nov.* 1748, that if there is nothing more in the will to indicate the teſtator's intent they ſhould have that effect according to the legal operation, not according to any ſuppoſed intent. The two leading caſes are that and *Papillon* v. *Voice*, 2 *Wil.* 472, but this cannot be determined on the ſame grounds. In *Bagſhaw* v. *Spencer* the preciſe ground on which *Your Lordſhip* determined it, was, that by interpoſition of truſtees to preſerve contingent remainders the teſtator intended an eſtate to the tenant for life forfeitable, ſuch as if he did any act to prevent the intail or contingent uſes from taking effect, the truſtees might enter. The judges of *B. R.* had a ſhort time before determined, what had been the effect at law of a limitation to truſtees during life of tenant for life to preſerve contingent remainders with a limitation afterward to the heirs of his body; they held, that the interpoſition of truſtees prevented the eſtate

Ante.

Colſon v. Colſon, May 8, 1740. Cited ante.

for life in the firſt taker from merging in the inheritance, and therefore he took an eſtate for life and a remainder in tail after the limitation to the truſtees; and grounded themſelves on *Duncomb* v. *Duncomb*, 3 *Lev.* 437. *Your Lordſhip* going upon that ground conſidered the court as preſſed with this conſequence, that if the court inſerted in the conveyance the limitation to truſtees, they would follow that eſtate with the contingent uſes to be preſerved, and limit them in a regular and proper manner: but that if the court omitted them, then the court would give upon the execution of that truſt a different legal eſtate upon the legal operation of the words, from what the teſtator intended; for that the conſequence would be, that the eſtate for life would merge in the inheritance, and he would take an eſtate tail contrary to the intent. In the caſe of Serjeant *Maynard's will* (Sir *John Hobart* v. Lord *Stamford*) the reaſon, inducing the court to go as it did, has not been in any other inſtance before or ſince. The ground of the determination in *Withers* v. *Algood* by Lord *Talbot* was from the abſurdity, and to make all take in the ſame manner by way of purchaſe: but there is no inſtance where this court ever carried a bare truſt for life, remainder to heirs of the body, into ſtrict ſettlement. It will be contended, that there is a difference between the limitation to the petitioner and thoſe following to the other children; and therefore that the teſtor knew how to limit an eſtate tail properly, and did it on this ground, that the petitioner was in being at the time of making the will, and therefore could be made tenant for life, but that as to the reſt not *in eſſe* he muſt make the limitation to them an inheritance. It is ſtrange to ſuppoſe a leſs beneficial intereſt intended to the eldeſt ſon than to the other children; nor is it abſolutely true, that to one not *in eſſe* an inheritance muſt be limited; for it might be made by way of contingent remainder for life, ſuppoſing it to ariſe within the time allowed by law, tho' beyond that an inheritance muſt ariſe. There might be one reaſon to limit it to the petitioner for life particularly; he might have a doubt whether the petitioner and his ſon, if he had a ſon at his mother's death, might not take jointly; which might occaſion that limitation in a different manner. Whatever weight this objection might have in thoſe two leading caſes, where the court did argue from it as auxiliary (for there was a much ſtronger argument) no caſe was ever yet determined on that ground; it is too ſlight; for it would be ſaying, one cannot limit the ſame *ſpecies* of inheritance to different perſons in the ſame will by different words. If in one part a proper eſtate tail is limited by correct words, in another by words conſtrued to carry an eſtate tail, the court will not ſay, the latter ſhould not carry it becauſe of the former correct words. So on a deviſe in fee. If it is ſaid, the intent was, that the reſt ſhould not be barred, that intent could go no farther than the firſt; for the ſecond ſon unborn had a certain eſtate tail; there is no plain indication therefore of intent of a ſtrict ſettlement, or that the petitioner

C'ted ante Bagſhaw v. Spencer.

Ante.

petitioner ſhould not be able to bar the remainders; and it is the conſtruction of this court, that muſt take away the legal effect of theſe words. As to the inconveniencies if otherwiſe, the court has no power to make him tenant for life without impeachment of waſte; for that was never done but in *Leonard* v. Lord *Suſſex*, 2 *Ver.* 526. and the court might as well arbitrarily give him power to make a jointure, as cut down trees, for it is equally inconvenient to want both powers; the laſt of which could not be done by this court, though perhaps the other may. All theſe inconveniencies, full as great as the giving him power to bar the remainders, will be avoided by this conſtruction. As to the truſt of the perſonal eſtate, there is no direction to lay it out in land. Where it is limited for life, remainder to heirs of the body, and in default of iſſue, over, the whole veſts in firſt taker. Some caſes on peculiar grounds of diſtinction have gone ſo far as to make *heirs of the body* words of purchaſe, as *Peacock* v. *Spooner*, 2 *Ver.* 195. but all the authorities ſubſequent to *Webb* v. *Webb*, 2 *Ver.* 668. concur to veſt in firſt taker. Indeed a contingent limitation over will take effect, if it can; but not on a general dying without iſſue, as here. In all thoſe caſes of a double contingency it has been to *A.* for life, remainder to firſt and every other ſon, in default of iſſue male to daughters, in default of ſuch iſſue to *B.* If no ſon or daughter is left, the court will conſider it as if thoſe limitations were never inſerted, and the remainder to *B.* as immediate after the limitation for life: but on the preſent words the court is compelled to ſay, the whole veſts in the firſt taker. If ſo as to the perſonal eſtate, that is a ſtrong ground for the court, (which inclines to make an uniform determination), to go on as to the real. Words of limitation over have ſometimes been conſtrued different as to the real and perſonal, as in *Forth* v. *Chapman*, 1 *Will.* 663. but the court there went on the word *leaving*.

For *Thomas Gore*. It is to be hoped, this queſtion is reduced to a certainty, at leaſt as to eſtates deviſed in truſt; for as to legal eſtates, where to the anceſtor for life with a limitation to the heirs of his body, it muſt be deſpaired ever to ſee it reduced to a certain principle; for the determinations go upon neither principle. One is, that the intent ſignifies nothing. The law has ſaid, that the anceſtor never ſhall take an eſtate for life, and make the heir purchaſer; becauſe it was a fraud upon the tenure; not upon the conſtruction that if an eſtate for life is given, remainder to his heirs, the ſame was meant as if given to him in fee: but the law ſays, you ſhall not do it, becauſe taking an eſtate for life and making the heir purchaſer, will deſtroy all the fruits of the fee: it is not, that the man does not intend it, but the law upon principles of policy ſays, that the limitation is void, not going upon the intent: and ſo it is as to perpetuities. That rule being once eſtabliſhed, though

the reaſon ceaſed by the abolition of tenures, yet courts of law might do right in adhering to the rule. If therefore the determinations had been uniform, that in a limitation for life to the anceſtor and to heirs of any ſort they were never words of purchaſe but of limitation, it would be a conſiſtent rule. But courts of law have allowed an exception out of this rule for the ſake of the intent; and have in many caſes at law laid hold of a word of intent, that the teſtator meant an eſtate for life, and therefore the general rule ſhould not take place; as in *Backhouſe* v. *Wells*, (*Eq. Ab.* 184.) on the word *only*; for if it had not been for that word, *iſſue* (which in a will is the ſame as heirs of the body) would not alone have done. So in *Pibus* v. *Mitford*, 1 *Ven.* 372. *et non aliter* were the words. In *Legat* v. *Sewel*, (*Eq. Ab.* 395.) it was grounded on the intent; and that intent was upon words of limitation grafted. So in *Liſle* v. *Gray*, 2 *Lev. &c.* they went on the word *heirs*, from the intent even in a deed that it ſhould be ſo. But the determinations at law will not put it on the intent; for in *Colſon* v. *Colſon*, which was a mere legal eſtate, if they were to go on the intent, the mere interpoſition of truſtees to preſerve contingent remainders was a ſtronger indication of intent than *only* or *non aliter*; as it ſhewed, he had a notion, that his limitation was contingent. Then it goes not upon the intent, but reſults to the original point, that whatever was the intent he ſhall not do it: and yet it was never laid down in any caſe at law, that notwithſtanding the intent it ſhall not be done. In *Broughton* v. *Langley*, 1 *Lut.* 814, and imperfectly in *Sal.* 769. the intent is gone upon but by ſaying, that it was not an indication of the intent; as *Holt* in his anſwer to the objection ſhews, although a power to tenant in tail in the will to make a jointure, does ſeem a ſtrong indication of the intent. From theſe caſes one cannot ſay, whether the intent was to govern or not. Thus it ſtands at law: but where the eſtate is in truſt, it is to be hoped, we are now come to certainly know the rule, by which the queſtion is to be determined; for what is ſaid in *Boraſton*'s caſe will hold much ſtronger in caſe of a truſt; that if improper words are uſed, the law will conſider by what proper words he might have done it; and if his intent was clear, that ſhall be ſupported: but if he endeavours at a perpetuity, or giving an executory deviſe beyond the time allowed, that he could not have done by proper words, and that ſhall not be ſupported in favour of the intent. That holds *a fortiori* in caſe of truſts; for if the intent is clear, he cannot commit a blunder in point of form; and upon this ſenſible reaſon; the truſtee is to make a conveyance under direction of the court; when the court is to give direction, they are to tranſlate into technical terms. Then the direction, the court is to give here, is to put in proper words. In *Hopkins* v. *Hopkins*, (*Tal.* 44.) it was on the point, whether the remainder over would veſt immediately, there being no truſtees to preſerve, *&c.* in the declaration of truſt;

and it is certain, that where the whole legal eſtate, the fee ſimple, was given to truſtees they interpoſed in the truſt, would ſupport what followed as to contingent remainders,* and there is no occaſion to repeat them. In *Bagſhaw* v. *Spencer* there are truſtees interpoſed in the truſt. That might introduce the diſtinction (there doubted of by *Your Lordſhip*) between truſts executed and executory; for in executory truſt, as to lay out money in land, the whole not being compleated it is in the form of it a direction to them to ſettle; in the other caſe the whole was ſettled; and this court adhered to the determination of courts of law; but not where a court of law had nothing to do with it, but would determine according to the intent; wherever the legal eſtate is to truſtees, in point of form (provided the meaning was clear) that muſt be carried into execution according to his intent, and that by apt, technical words and forms, and that is the diſtinction between legal and thoſe, which are to be carried into execution in this court; for it is ſettled, that notwithſtanding determinations at law upon the formal words of a legal eſtate, where this court interpoſes in execution of a truſt, no technical words will prevent decreeing according to the intent an eſtate for life, though the word *heirs* is afterward uſed. If then this is admitted to be a truſt, not an uſe executed, as to the real eſtate, and the prayer of the petition is to have a conveyance purſuant to the truſt, the court muſt firſt find out what the teſtator meant as to the ſubject of the deviſe both real and perſonal eſtate. Firſt as to the perſonal which is much the moſt conſiderable. The old rule of law (that where the anceſtor took an eſtate for life, the heir ſhould not take as purchaſer) did not extend to perſonal eſtate; becauſe the reaſon did not, as there could be no conſideration of tenure or fraud upon the lord; wherever therefore in ſuch a limitation of a contingent intereſt, that conſtruction has been adopted, it has been by way of analogy and upon foundation of the intent: but otherwiſe the word *heirs* as applied to perſonal eſtate is in its nature a word of purchaſe, not limitation: *e contra* as applied to real. To conſider the authorities and rule of law as to this applied to perſonal, unleſs ſomething particular in the manner of giving it, in ſettling or intending to ſettle perſonal eſtate, *heirs* is in general a word of purchaſe, though by way of analogy to the limitation of freehold eſtate the firſt taker may take it abſolutely, where it was intended barely to mark the line of ſucceſſion in which to go. The leading caſe is *Peacock* v. *Spooner*; where the judgment, that they were words of limitation, was reverſed, and that reverſal upon the reaſon of the thing affirmed by the *Lords*. A ſtrong confirmation of that was afterward by Lord *Somers* (who muſt have known

* *Lord Chancellor*: It was firſt determined by Lord *Somers* in *Penhay* v. *Hurrell*, that the original truſt ſerved all the remainders, 1 *Will.* 56. *Ante*, *Allanſon* v. *Clitherow*, 23 *July* 1747.

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the whole of it) in *Daffern* v. *Daffern*, 2 *Ver.* 362. *P. C.* 96, where they were held words of purchaſe; and in thoſe two caſes there is no argument of intent beſide being a limitation for life and a ſettlement on huſband and wife and the heirs, that is the children, of the marriage. Nothing is there ſaid of an argument drawn from *ſtat.* 11 *H.* 7. It is true, that about eleven years afterward a caſe came before Lord *Harcourt* in 1710. which certainly contradicts both the former and the judgment of the *Lords*; and the queſtion will be, whether ſince *Webb* v. *Webb*, (beſt reported in 1 *Will.* 132.) *Your Lordſhip* has adopted that determination, or adhered to the former. Though there was a great diverſity of opinions among the judges, yet *Your Lordſhip* upon ſearching the minutes found, they did not go on *ſtat.* 11 *H.* 7. It was a marriage-ſettlement in *Webb* v. *Webb*, and the words *ſo long of the term as ſhe ſhall live*, which *Your Lordſhip* in *Hodſel* v. *Buſſy* held to be as ſtrong as *for life only* or *non aliter*; and in a marriage-ſettlement this court will never preſume an intent to defeat the iſſue. Lord *Harcourt* had then no notion of a diſtinction between a truſt and legal limitation; and the differences taken by him between that caſe and *Peacock* v. *Spooner* have nothing material in them; and that caſe has ſince been doubted of, and the former adhered to. The firſt in point of time is *Withers* v. *Algood*, 4 *July* 1735. where Lord *Talbot*, the next day after he had fully pronounced his judgment, cited in favour of his opinion *Daffern* v. *Daffern* as ſtrongly ſupporting *Peacock* v. *Spooner*, and mentioned *Webb* v. *Webb* as decreed by Lord *Harcourt* to the contrary without aſſigning any, or at leaſt ſatisfactory, reaſon. In *Sands* v. *Dixwell*, 8 *December* 1738. Freehold and leaſehold were deviſed in truſt to convey to the ſeparate uſe of his daughter for life without the intermeddling of her huſband, and after her deceaſe in truſt to the heirs of her body; the queſtion was, whether an eſtate tail or *heirs of the body* were words of purchaſe; *Your Lordſhip* upon conſideration held them in that caſe words of purchaſe, arguing from the intent, and alſo that as to the real eſtate they may be proper words of limitation, but as to the leaſehold they were proper words of purchaſe; and that the direction to the ſeparate uſe of the wife ſhewed, it meant for life. Another determination by *Your Lordſhip* was in *Hodſel* v. *Buſſy*, 5 *December* 1740. where *Edward Buſſy*, ſeiſed of a reverſionary term, aſſigned to truſtees to permit *Grace* the wife to take the rents and profits during the term, if ſhe ſo long live; afterward to the uſe of *Edward* during life; and after the deceaſe of *Edward* and *Grace* in truſt for the heirs of the body of *Grace*, begotten or to be begotten by *Edward*, their executors, adminiſtrators, and aſſigns; the queſtion was, whether it veſted in *Grace* abſolutely; which it did, if *heirs, &c.* are words of limitation, not if words of purchaſe; and this was a deed, and voluntary for ought appears: yet it was held, that *Grace* was only intitled for life, that they were words of purchaſe, and that from the ſubſequent

ſequent limitation to executors, &c. grafted thereon: and *Your Lordſhip* laid a ſtreſs on this, that *heirs* as applied to perſonal was a word of purchaſe properly, not of limitation. The intent here undoubtedly was to create a ſucceſſion of eſtates tail as to this perſonal eſtate; but his intending more than the law allows, will not vitiate that part founded in law, for this court will carry that truſt into execution ſo, as that he could diſpoſe of it. If a daughter had not been born, *Thomas Gore* would have been intitled to this perſonal eſtate upon the queſtion of a double contingency. The reaſon, that in the caſes of double contingency, the birth of any child of the tenant for life defeats all the remainders over, is, that thereby the only contingency, which was good originally, is become impoſſible, the other being bad originally: but it has never been yet determined, that the birth of a child of a ſubſequent remainder would defeat contingent remainders over properly limited on an eſtate tail. If the birth of this daughter veſts an eſtate in her though capable of being deveſted by birth of a ſon or daughter of the petitioner while in contingency, yet if the petitioner was to dye leaving a wife *enſient*, it could not deveſt for that after born child. All this therefore remains in ſuſpenſe until the contingent remainder over comes to take effect or be determined. It is common in this country, where there are large chattel intereſts, for a man to limit them to his firſt ſon for life, remainder to his firſt and every other ſon in tail, ſo to his brothers, and remainders over: if any of thoſe intervening remainder men ſhould have a child in life of the tenant for life, who then had no child, and that ſhould defeat all the limitations behind, and not be conſidered as in ſuſpenſe, it might be of bad conſequence as to theſe limitations. This then is an executory truſt with contingent limitation over to *Thomas Gore* provided the antecedent limitations in tail were ſpent in his life. If this, agreeable to the intention is the conſtruction as to the perſonal eſtate, it affords an argument as to the real blended therewith; for certainly *heirs*, *&c.* are not meant words of limitation in one caſe, and of purchaſe in the other. It is material, that a ſettlement by the will is plainly intended; and upon that a ſtreſs was laid by *Your Lordſhip* in *Coriton* v. *Coriton*. He is giving to collateral relations, and means *Sarah Garth* to be the ſtock; and probably he and the drawer knew how to make a ſtrict ſettlement by giving to the object in being only for life, (which expreſs words of the will muſt not be left out), and how to give an eſtate tail, and how the abſolute property, and that he could not make a child unborn tenant for life, and give it to his iſſue. There cannot be a contingent limitation on a contingent limitation. If the petitioner is conſtrued tenant in tail, there will be no difference, the teſtator having limited proper eſtates tail to the reſt unborn; if he meant the ſame before, why not uſe the ſame words? The court, eſpecially in execution of a truſt, will ſupport that intent, which is lawful, and ſet aſide that which is not ſo; which is no more, than what *Your Lordſhip*

has done upon the *ſtat.* of *Mortmain*, where to be laid out on two funds, the one legal, the other not. He intended to make a family, from the direction to take his name. The particular reaſon, he has given, ſhews his anxiety to preſerve the laſt remainder. He meant this to be executory, veſting all in truſtees with a poſitive direction to make a conveyance at ſome period of time. The court in directing a conveyance can no more adhere to the words of the will than in *Bagſhaw* v. *Spencer*, or *Colſon* v. *Colſon*; which muſt therefore be departed from to find out the meaning. If that is clear to give only an eſtate for life to the petitioner, the ſubſequent limitation muſt not be to heirs of the body, but the court to anſwer that plain intent muſt change thoſe words into firſt and every other ſon.

For Sarah Garth, the infant daughter, it was inſiſted, that the money ought not now to be paid to the petitioner.

LORD CHANCELLOR.

Since this cauſe has been brought on, I have had ſo much opportunity to conſider it, and have lately had ſo much opportunity and neceſſity of looking into all the caſes upon this queſtion in *Bagſhaw* v. *Spencer*, that, though I had formed no judgment, until I heard the argument, yet I am better aſcertained in my judgment now, upon what is proper to do.

This is now brought on upon a point, that has long exerciſed the ſkill and *acumen* of the judges both in law and equity, and has undergone various determinations in different times and different caſes; and, when a determination is to be made upon arguments of intention from clauſes in a will without poſitive expreſſions of intention, no wonder it ſhould be ſo, and that one caſe cannot be made an authority for another: but however though different judges at different times have varied from one another, I ſhould be very unwilling to vary from and contradict myſelf in my preſent determination from that in *Bagſhaw* v. *Spencer*; and therefore my opinion, I hope, will be conſiſtent with that, upon the diſtinction between the two caſes.

There are two general queſtions; and I will take them according to the order of the will, and in which the petitioner's counſel ſpoke; firſt as to the real, next as to the perſonal eſtate.

The firſt is, whether or no this court can now decree a conveyance of the real eſtate to the petitioner? If it can, in what manner to direct that conveyance and with what limitations; that is, whether he has a right under this will to be tenant in tail of the real

eſtate or barely tenant for life; for that muſt be ſettled to govern the court in the direction for the conveyance? I am of opinion, that upon the conſtruction of this will I am obliged by the rules of law and equity to direct the conveyance to be in tail to him. Several caſes have been cited, or rather properly alluded to as being well known. For *Thomas Gore* it is inſiſted, that by ſeveral determinations in this court, particularly in *Papillon* v. *Voice*, and in *Bagſhaw* v. *Spencer*, he is clearly intitled to have a remainder in fee limited to him, and nothing but an eſtate for life limited to the plaintiff; for that thoſe caſes have laid down a rule, that a conſtruction is to be made on the whole will, and this court is not bound by the legal, technical ſenſe of the words uſed, but to follow the intent; and as there are reaſons and proofs of intention in thoſe caſes, ſo there are here, to make him tenant for life. The principle, I go upon, is what I went upon in *Bagſhaw* v. *Spencer*; it is this principle, and not departed from before or ſince, that in limitations of a truſt either of real or perſonal eſtate to be determined in this court, the conſtruction ought to be made according to the conſtruction of limitations of a legal eſtate; with this diſtinction, unleſs the intent of teſtator or author of the truſt plainly appears to the contrary: but if the intent does not plainly appear to contradict and over-rule the legal conſtruction of the limitation, it never was laid down, nor was it by me in that caſe, that the legal conſtruction ſhould be over-ruled by any thing but the plain intent. I lay down the rule therefore, as Lord *Hobart* did in *Counden* v. *Clerke*, *Hob.* 29. in *margine* (for they are known to be his words, and in his emphatical ſtile) ſo I ſay, that I am not in a court of equity to over-rule the legal conſtruction of the limitation, unleſs the intent of the teſtator or author of the truſt appears by declaration plain; that is not ſaying it in ſo many words, but plain expreſſion or neceſſary implication of his intent, which is the ſame thing. That was my ground, and is ſo now. I have brought my argument in *Bagſhaw* v. *Spencer*, and will repeat what I there ſaid. The firſt queſtion was, what appears to be the true intent of the teſtator? The ſecond, whether that is conſiſtent with and can take effect according to the general rules of law and equity? The third, whether there is any particular ſettled rule or determination of this court ſtanding in the way to prevent the intent from taking effect? As to the firſt queſtion I took it very clear, that he veſted the whole fee in truſtees, and after directing the particular truſt divides it into moieties, one to his nephew deſcending from his ſiſter *Bagſhaw*, the other to his nephew deſcending from his ſiſter *Spencer*; to every nephew in being, and proper to be made tenants for life, expreſſly deviſes for life, and adds to all of them without impeachment of waſte; which clauſe, though not alone ſufficient to prevent the operation of law, is one mark of his meaning; then deviſes to four of his truſtees to preſerve contingent remainders during the life of *Benjamin Bagſhaw*.

Conſtruction in equity of truſt of real or perſonal, is according to the limitations of a legal eſtate: unleſs there is a plain intent to the contrary.

Upon

Upon this I conſtrued it, that the teſtator had declared, he meant to give *Benjamin Bagſhaw* ſuch eſtate, as might be forfeited, not only an intereſt for life; becauſe giving it to truſtees after the determination of that eſtate during his life, could mean nothing but a determination by forfeiture; and further that it amounted to the ſame thing, as if the teſtator expreſſly declared his meaning to be to give only an eſtate for life to *Benjamin Bagſhaw* forfeitable, and contingent remainders to thoſe deſcribed afterward as heirs of his body. This was the ground, and this plain declaration of his intent, inforced me to make that conſtruction. Then to bring it within that caſe; the queſtion is, whether the proofs and evidences of his intent come up to thoſe in that caſe; not the ſame in *ſpecie* (which cannot be in any caſe), but whether equally ſtrong and cogent to compel the court to make the ſame conſtruction. I am of opinion, they are not, and that they are only doubtful evidences and inferences of intent, not clear nor by declaration plain according to the emphatical expreſſion of Lord *Hobart*. Then to conſider the arguments of intention in this caſe. The argument is, that he has created a truſt: without doing that he could not have anſwered that intent to the ſole and ſeparate uſe. It is argued for the defendant that an intent is ſhewn to keep the eſtate in the hands of truſtees all this time, and that the plaintiff ſhould receive the rents and profits of the real eſtate from the truſtees, and they ſhould pay over to him, and therefore an intent to keep him out of poſſeſſion and abſolute property, and it ſhould go to the heirs of his body. I do not doubt, but that he had a very large, general, intent; but it is plain, that his intent could not take effect according to the rules of law: for after limiting it in this manner to the petitioner for life and heirs of his body, the ſame evidence of intent appears here as to all ſubſequent remainder men, and as to all of them certainly it could not take effect. He could not create ſuch a ſeries of remainders one after another with a reſtraint of alienation, if that was his intent; for if the plaintiff died without iſſue, and the eſtate came to his brother or ſiſter, they would have the abſolute diſpoſal of it, that is by ſuffering an equitable common recovery, which would bar all their own iſſue and the remainders. Taking that therefore to be his intent, it could not take effect. Conſider what next evidence of his intent is mentioned, *viz.* that he has directed all thoſe, who were to take ſucceſſively, to take his name; and ſo he has, but I ſhould rather think, that in directing that, an argument of his intent ariſes the contrary way. Then what is the legal conſtruction unleſs clear evidence of his intent? And how have courts of law and equity both conſtrued that evidence of intent? Firſt in a court of law; and it is true, courts of law are to govern by the intention in wills as well as courts of equity. In a caſe very like to this, *Broughton* v. *Langley*, 1 *Lut.* 814, *Sal.* 679. expreſly held to be an eſtate tail notwithſtanding there was ſtronger evidence of

intention

intention there. The conſtruction of *B. R.* there was, that the direction to ſtand ſeiſed to the uſes after mentioned, to permit to receive the rents and profits during life, and afterward to uſe of heirs of the body was an uſe and legal eſtate for life in him, and therefore *heirs of the body* united with that according to *Shelly*'s caſe, and gave him an eſtate tail: whereas if that was conſtrued a truſt (for which there was ſome ground there to hold the firſt limitation to be a truſt, for it was not ſaid an uſe there) he would have a truſt eſtate for life; afterward the truſtees were to ſtand ſeiſed to the uſe of heirs of the body; which could not then have united with the truſt eſtate to him for life, but was kept ſeparate, and heirs of the body would conſequently take as purchaſers. I have heard, that this determination of *B. R.* was meant, that this court ſhould turn truſts into uſes again; and it has an eye to that. But what was the ſtrongeſt evidence of intent to have gone upon, was, the power given there, not to the party alone but to the truſtees and him, to make a jointure; which was ſtrong evidence. It is true, that has been held, as in *King* v. *Melling*, not to be a cogent argument to make a tenant in tail by uniting, becauſe it might be a convenience to tenant in tail to make a jointure without barring: but it was alſo to the truſtees as well as to him, which is the ſtrongeſt evidence of intending the eſtate ſhould remain in thoſe truſtees: and yet by the unanimous opinion of that court the rule of law held ſo ſtrong, that notwithſtanding that evidence, it could not be got over. There are ſeveral other caſes at law: but this is ſo like, it is needleſs to cite them. Then how is it in a court of equity? Firſt *Legat* v. *Sewel* by Lord *Cowper*, who at that time had no notion of a diſtinction ſince taken up between truſts executory and executed, but thought, that a ſettlement directed to be made was the ſame as a poſitive immediate limitation; and, though it was a caſe of money to be laid out in land, directed a caſe to be made, as upon lands deviſed in poſſeſſion; upon which three judges held, it was an eſtate tail. The opinion is ſtated expreſsly in 1 *Will.* 87. Indeed *Tracy* J. held otherwiſe; upon that Lord *Cowper* ſeemed to doubt (as I have heard) but held himſelf bound to agree with the three judges, and ſo decreed. In that caſe was the ſtrongeſt evidence of intention; for there are words of limitation mounted on the words *heirs male of his body*; yet they held the rule of law ſo ſtrong for uniting the eſtates, that there was not ſufficient evidence of intent to over-rule it. After that came *Bale* v. *Coleman*, which never has been denied to be law or a rule of this court. I took the liberty to obſerve in *Bagſhaw* v. *Spencer*, upon the general declarations of Lord *Harcourt* in that caſe, and did differ upon ſome of thoſe; but I there expreſsly declared as to my own opinion, though I differed as to his general reaſonings, that after all Lord *Harcourt*'s reverſal of Lord *Cowper*'s decree did not ſtand in need of thoſe general reaſons, but that it was plainly diſtinguiſhed from *Bagſhaw* v. *Spencer*; and

therefore in the general caſe of *Bale* v. *Coleman*, I was of opinion, that it was right to adhere to it. The tradition is, that it was reheard by Lord *Cowper*, and that he affirmed Lord *Harcourt*'s decree contrary to his own: but the fact is not ſo, for ſecond rehearings are ſeldom or ever granted. I believe, it was cited before Lord *Cowper* again, and that he ſpoke to that effect; ſo that the tradition I believe true, though upon a different reaſon. I will mention but one caſe more as to evidence of intention; though before two of the caſes already cited, yet I mention it laſt, becauſe relative to another kind of objection, *viz.* *Leonard* v. *Earl of Suſſex*, 2 *Ver.* 526. which was ſuch a declaration of intention, as could not poſſibly be got the better of; and there was perſonal mixed with real. Lord *Cowper* directed an eſtate for life, and took the liberty to add *without impeachment of waſte*. That was the plaineſt caſe; for if he had directed a ſettlement in tail, and added that clauſe, which is in that will, it would be contrary to law; there being no way of making that intent effectual but by making the ſons tenants for life, remainders to thoſe perſons who would be heirs of their bodies; which was a neceſſary conſtruction and a coercive argument to ſubmit to. It is ſaid, here is a declaration of an intent, that there ſhould be no conveyance to put the legal eſtate out of the truſtees, until the remainder to *Thomas Gore* took effect. It has undoubtedly an eye to that: but that is directly contrary to the rules of law, and what the court cannot comply with. Suppoſe the plaintiff ſhould dye, and the eſtate came to his brother, if he had one; now to his ſiſter; ſhe would be intitled to call on the truſtees to convey the eſtate to her, and no one could refuſe it; nor could it be refuſed to any purpoſe, becauſe ſhe might ſuffer an equitable recovery and bar. This young lady is now intitled to bring a bill by her *prochein amy* and inſiſt, that her brother is intitled for life, and ſuch limitations, and call for a conveyance; then it would come for the judgment of the court, what kind of eſtate ſhould be firſt limited to the plaintiff: that therefore can be of no weight. Conſider it then upon the latter clauſe directing a change of name, which he has confined to the ſons, and has not carried to daughters. What objection now to the plaintiff's taking an eſtate tail, to his brother's taking an eſtate tail? None ariſes from thence to overrule the conſtruction of law. Then conſider what evidence there is on the other ſide, or to rebut that evidence of intent. I am of opinion, there is very material, which at leaſt goes ſo far as to reduce it to great doubtfulneſs, and to leave it *in equilibrio* at leaſt; and then the rule and conſtruction of law ought to prevail. He muſt be bare tenant for life without power to make a jointure, or make a leaſe, or to cut down trees; which he cannot do if only tenant for life. I cannot be warranted to make it without impeachment of waſte. Lord *Cowper*'s ground in ſo doing was, that it had an eye to an eſtate tail, and therefore he would give it; for there

was nothing in the will to do it. Now ſuppoſe the queſtion had been put to the teſtator, whether he meant, this couſin, his firſt object, then but a year and a half old, ſhould, if he lived to take the eſtate, have no power to make a jointure; whom he had obliged to change his name on a ſuppoſition of continuing the eſtate in his blood under that name, to erect a new family, and intended, he ſhould marry, (and that made me ſay, the argument from that clauſe turned the other way and for the plaintiff), and yet reſtrain him from making a jointure, which can be the only poſſible way of continuing legitimate iſſue? Next did the teſtator intend, he ſhould not have power to make a leaſe for three or for ſeven years, which ſhould bind the remainder man? He certainly could not mean that, having given an eſtate tail to the younger brothers and ſiſters; how then could he intend not to give the elder brother a power to make a leaſe or cut down trees? Then his intent ſtands in *equilibrio* as on the face of the will, and the court is not warranted to take away the benefit of the legal operation of the words. But it is contended, that here is a limitation for life, and that the court muſt make a ſettlement and a conſtruction in order to the limitations of that ſettlement; and therefore muſt either leave out thoſe words *for life*, or let them ſtand; and in letting them ſtand it will be an inaccurate conveyance; for if left out, the ſuppoſed intent will be departed from. I agree, it would be an inaccurate conveyance to limit this to him for life, and from and after his deceaſe, to the heirs of his body begotten or to be begotten; which would be incorrect: but in a deed as well as a will, whatever the conveyance be, according to *Shelly*'s caſe, if the anceſtor takes an eſtate for life, and in another part of the conveyance to the heirs of his body, that unites and is an eſtate tail in him as well in a deed as a will: if therefore the words *for life* for form or nicety's ſake ſhould be put into this conveyance, it would not change it. That was not the caſe in *Bagſhaw* v. *Spencer*; for if there the court had left out the limitation to truſtees to preſerve contingent remainders, the conſequence would be, that the court would give an immediate eſtate tail in poſſeſſion, whereas according to *Colſon* v. *Colſon* it was an eſtate tail in reverſion only ſevered from the eſtate for life; it would be not only varying from the words but from the legal operation of the words. On the whole therefore it is clear, that I am not warranted by any authority to ſay, that the plaintiff is to be made but tenant for life according to thoſe words *for life*, but that the legal conſtruction of the limitation ought to take effect. The ground, I go upon, (and for the ſake of certainty I will repeat it, that is, ſuch certainty as there is in theſe caſes), is, that the court ought never to do that without ſuch plain evidence of intent, as is cogent and coercive, as Lord *Hobart* ſays: but here, admitting it as ſtrongeſt for the defendant, it is doubtful and *in equilibrio*,

and

and then according to all the rules the legal takes place. Thus as to the real eſtate.

As to the perſonal eſtate it is as plain, if not plainer. That does not concern *Thomas Gore*, the laſt remainder man in fee, but only the ſiſter or the iſſue of the plaintiff himſelf. There is no direction in this caſe to lay out the money in land; which might have made a different caſe: but it is a plain truſt and a gift of it on the face of the will. It is ſaid to concern *Thomas Gore*, becauſe that in all theſe caſes the limitations over are to remain in ſuſpence, and never veſted during the life of the tenant for life, and then if this lady died in the life of her brother, and he died without iſſue, it would go over to *Thomas Gore*: but I am of a contrary opinion: and the caſe put does not anſwer it. It is ſaid, if you do not make all in ſuſpenſe during life of the tenant for life, you will defeat the iſſue of the plaintiff himſelf; not the iſſue born during his life, for that would deveſt and defeat the veſting in the ſiſter, and veſt it in him; but it is aſked, whether if he dies leaving a wife *enſient*, the birth of that child afterward would deveſt the eſtate veſted in this daughter. I am of opinion, it would, and that upon two grounds. Firſt, that is ſuch a time, as the law will wait and expect, as in *Gore* v. *Gore* (2 *Wil.* 28.) and other caſes; that the birth of the child after the father's death cannot exceed ten months. But another ground is, in that caſe I ſhould go upon the equity of the *ſtat.* 7 *Will.* 3. which was made ſubſequent to *Reeve* v. *Long*, which has declared, that as to real eſtates a contingent remainder ſhall wait until the birth of that child; I ſhould go by analogy thereto, and hold ſo. Then as between the brother and ſiſter it comes to this; whether this is ſuch a limitation of perſonal eſtate, as will be admitted. The only caſe cited for it is *Peacock* v. *Spooner*: but that caſe is ſo particular, has had ſo much ſaid upon it, and has been ſo varied from, that I ſhall not go upon that. Lord *Harcourt* has ſaid, the court would not go upon that caſe, unleſs on that in *ſpecie*, and no other. It is true, it was ſo determined in the *Houſe of Lords*, but with great variety of opinion among the judges, and no peer in the houſe was of the profeſſion of the law; and there was ſomething particular by reaſon of the limitation to the heirs of the body of the wife; but that is a ſingle caſe, and this is not that in *ſpecie*. *Webb* v. *Webb* was directly to the contrary, and has ſtood ever ſince, and allowed to be rightly determined as not being the ſame in *ſpecie* with *Peacock* v. *Spooner*. All the other caſes have been upon particular diſtinctions of evidence of intention. In *Hodſel* v. *Buſſy* I held the adding the words *executors, adminiſtrators, and aſſigns*, ſtrong evidence of intent to give only an uſufructuary intereſt for life, and to veſt the property in the heirs of the body. So were the words in *Withers* v. *Algood*. So tha

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1. C. 2 Atk. 89. & ſtated ante by Lord Hardwicke 236, 237.

that thoſe differ plainly from the preſent caſe; which is then reduced to this, a gift of perſonal eſtate to one for life and heirs of his body; that muſt veſt the property of the money in him, whether the teſtator meant it or not, unleſs there was ſomething to warrant the court to lay it out in land: but there is nothing of that: and that was the caſe of Lord *George Beauclere* v. Miſs *Dormer*, *June* 17, 1742, heard by conſent at my houſe, and fully conſidered at the bar and by me. The words there were, Miſs *Dormer* I make my ſole heir and executrix; if ſhe dies without iſſue, then to go to Lord *George Beauclerk*, he to pay Lady *Diana Beauclerk* 5,000*l.* and the queſtion was, whether that was a proper limitation over of perſonal eſtate or too remote? I was of opinion, it was too remote, and that has been the conſtant doctrine, all the caſes amount to that, and has never been varied from. It was there contended, that the word *then* imported a time, and meant then immediately after her death it ſhould go over: but the court ſaid, if ſuch a conſtruction was allowed to the word *then*, it would over-turn all the rules of conſtruction; and that a failure of iſſue at any time, was what was there meant; and all the other caſes are very ſtrong to that effect. *Sands* v. *Dixwell* was very different. The governing reaſon, I went on, was, that it was impoſſible to make ſuch a conveyance, as the teſtator had directed, that is to be ſettled ſo as to be to the ſeparate uſe of the daughter for life without intermeddling of her huſband, unleſs ſuch a conſtruction was made; for if tenant in tail, the huſband muſt have been tenant by courteſy. As to the argument of intent, how can ſuch an intent in the teſtator be reaſonably ſupported? That is to make the plaintiff a bare uſufructuary for life as to the perſonal eſtate, but the moment he ſhould have a child born, the perſonal eſtate ſhould veſt in that child; and ſo reſtraining it thus only to give it to a child unborn, whom he could not know; and if that child ſhould ſurvive, and die a minor, this great perſonal eſtate inſtead of being for the benefit of this family would go to the perſonal repreſentative of that child. No one could mean that. It is a limitation of perſonal eſtate to one for life and the heirs of his body; which veſts abſolutely, whether ſo intended by the teſtator or not.

The plaintiff is therefore intitled to have the lands conveyed to him, and the perſonal eſtate to his uſe.

Anonymous, *July* 21, 1753. Caſe 226.

EXCEPTIONS by the repreſentative of Mrs. *Guidot* to the Maſter's Report for not allowing intereſt for arrears of her jointure.

Intereſt not allowed for arrears of jointure, unleſs a ſpecial caſe made.

Lord Chancellor ſaid, the rule of the court for allowing intereſt for arrears of a jointure is not general, but the court will expect a ſpecial caſe to be made for that, as the being obliged to borrow money and to pay intereſt for it; and then the court will give intereſt from a reaſonable time; but this not being within the decree, nor within the reaſon of thoſe caſes, he would not allow it.

Caſe 227. Leech *verſus* Trollop, *July* 21, 1755.

EXCEPTION to a report of a ſufficient anſwer to a bill for diſcovery of title-deeds.

Jointure. On offer to confirm it, widow not obliged to diſcover by the anſwer, until the act is done.

LORD CHANCELLOR.

I do not take it to be the courſe of the court, that upon an offer to confirm a widow's jointure the plaintiff is intitled to have the diſcovery by the anſwer upon that offer, but by the decree; for ſuppoſe the plaintiff claims to be tenant in tail, and offers to confirm the defendant's jointure upon diſcovery of the deed, and dies, his iſſue in tail would not be bound by that offer; the act muſt therefore by firſt done, and not the diſcovery had by the anſwer upon that offer.

Caſe 228. Anonymous, *July* 21, 1755.

Prior mortgagee may tack a ſubſequent judgment, not *e con.*

May tack a bond againſt heir of mortgagor, but not againſt mortgagor himſelf or creditors.

UPON ſettling the priority of creditors after Maſter's report, defendant the mortgagee inſiſted, that he could not be redeemed without being paid his judgment-debts, and alſo a bond-debt in preference to the plaintiff's claiming under a deed of truſt by the mortgagor in his life-time conveying the equity of redemption; and that though a bond cannot be tacked againſt the mortgagor himſelf coming to redeem, it may againſt the heir of mortgagor; and the plaintiffs coming after mortgagor's death ſtand in place of the heir.

LORD CHANCELLOR.

The ground, upon which the court does it againſt the heir of mortgagor, is, becauſe otherwiſe there would be a circuity; for after redemption it is aſſets in his hands: but if mortgagor in his life conveys the equity of redemption, it is another thing. This Diſtinction has been taken; it is held, that a prior mortgagee having a ſubſequent judgment may tack the judgment to the mortgage; but a prior judgment creditor getting a ſubſequent mortgage cannot do it, becauſe the judgment is not a ſpecifick,

ſpecifick lien upon thoſe lands, that is, he does not go on the ſecurity, he has not truſted to the credit of the eſtate. As to the two judgments, which are prior to the deed of truſt, the defendant *Chamberſ* ought to have the benefit of them, and as to what is reported due thereon is intitled to a priority to the creditors under the deed of truſt: but the bond cannot be tacked, the bond is a charge upon the aſſets, and the court never does it againſt creditors.

Pawlet *verſus* Delaval, and *e contra*. *July* 28, 1755. Caſe 229.

Baron and feme.

A wife is barred from claiming her ſeparate eſtate, which ſhe with her huſband and the truſtee had called in, that was managed by the huſband, and that after his death was affirmed by ſeveral acts of hers as part of his eſtate.

See 2. Ves. Jun. 480.

ON the marriage of Lord *Naſſau Pawlet* with *Iſabella*, daughter of Lord *Thanet*, in 1731 it was agreed between them, that whenever a ſum of money, which ſhe expected upon the death of the Ducheſs of *Montague*, ſhould come to her, it ſhould be to her ſeparate uſe, and ſhould be paid to truſtees for that purpoſe. Accordingly on the death of the Ducheſs in 1734, the ſum, which was unaſcertained before, amounting to 23,000 *l.* was placed out at intereſt on ſecurities to her ſeparate uſe. In 1738 the huſband and wife call in this money, which was out on two ſeveral mortgages, and thereupon together with the truſtee they execute two deeds, in which they recite the ſeveral facts and agreements, that the money was placed out on ſuch mortgage, and that it was declared to be in truſtees for the ſeparate uſe of the wife ſubject to her direction and appointment during coverture, but without any particular forms preſcribed in which ſhe ſhould execute that appointment; and that the huſband and wife had agreed to receive this money to their own uſe, and to diſcharge the truſtees from any future truſt concerning the ſame, and in conſideration this ſum of money was paid to the huſband and wife by and with the conſent and approbation of the truſtees. Theſe recitals were *verbatim* alike in both deeds as to both mortgages, and the money is thereupon ſo paid. It was received by Lord *Naſſau*, and when afterward placed out on mortgages, it was in his name alone, and the intereſt was received by him until his death in 1741; from which time ſhe as to this ſum acted in his name and merely as his executrix, giving receipts for intereſt as ſuch, and entering an account in the ſame book her huſband did, and mixed it with his eſtate. In 1749 ſhe intermarried with Mr. *Delaval*; upon which a ſhort minute was taken between themſelves without any other aſſiſtance, which was afterward further explained by articles, whereby after taking out ſo much as it was agreed Mr. *Delaval* ſhould have, all the reſidue of her money, which ſhe was intitled to or poſſeſſed of at the day of her marriage, ſhould be to her ſole and ſeparate uſe. In 1750 they parted; afterward came together again; and

Nov.

Nov. 29, 1750 they execute a deed reciting the terms on which they married, parted, and came together; and expreſly reciting that this deed was in order to make a diviſion of the perſonal eſtate of Lord *Naſſau* between herſelf and her daughter, the only remaining repreſentatives of Lord *Naſſau*; and reciting that in the events which happened, the ſurplus of the ſaid perſonal eſtate was to be divided between them; and further that Lady *Iſabella* had poſſeſſed herſelf of all the perſonal eſtate in the ſchedule annexed, but that no diſtribution had been made: after theſe recitals came the ſchedule, intitled an account of the perſonal eſtate of Lord *Naſſau Pawlet* and of what it conſiſted at the time of his deceaſe. The perſonal eſtate was divided into moieties, one of which by the conſent and direction of Mr. *Delaval* and his Lady was veſted in truſtees for Miſs *Pawlet* and paid accordingly. There was added to the deed a *memorandum*, that any errors or defects, that may afterward appear of the above eſtate of Lord *Naſſau Pawlet*, are to be without prejudice of any of the parties, and are to be rectified.

A bill was brought in the name of Miſs *Pawlet* for her benefit in general to have an account of her father's perſonal eſtate, and certain legacies out of it, and a ſhare of the reſidue thereof upon the events which happened, and in particular to eſtabliſh it that this 23,000*l.* was to be conſidered as part of her father's eſtate, and conſequently that ſhe was intitled to one moiety of it: for though this was originally truſt-money of the wife, yet ſhe having by agreement diſcharged that truſt, and declared no other, it became thenceforward the abſolute property of her huſband Lord *Naſſau*, and was always treated by them as ſuch; all her acts amounting to preſumptive evidence that ſhe intended, this ſhould go as part of his eſtate; and in a tranſaction between huſband and wife the court goes farther by way of preſumption than in other caſes, *Powel* v. *Hankey*, 2 *Will.* 82. ſo as not to expect that exactneſs in deeds between them as between ſtrangers.

Another bill was brought by Mr. *Delaval* and his wife, the end of which was alſo to have a general account of Lord *Naſſau*'s perſonal eſtate: but that bill brought on a queſtion alſo as to this ſum of money, it being inſiſted that they were intitled to be relieved againſt ſeveral acts done by them, and in particular againſt the deed executed by both in 1750, by which that ſum was acknowledged to be part of the perſonal eſtate of Lord *Naſſau*, whereas it was originally and continued to be ever ſince part of the ſeparate eſtate of Lady *Iſabella*, and therefore that acknowledgment was by miſtake, and it ought not to be ſo conſidered, but was claimed now to belong to Mr. *Delaval*. The court will not upon a conjecture of gift, admitted not to be proved, ſtrip Lady *Iſa-*

bella of this large ſum ſecured to her by two ſolemn deeds on her marriage. It is the duty of this court to protect a *feme covert* from any inadvertent act of hers, and not to preſume ſhe intended to part with that property. This court follows with great jealouſy the ſuſpicion, the common law has of the power of a huſband over a wife, and is careful to prevent her affection and obſequiouſneſs, or her fears from operating to her prejudice. Her inheritance and dower muſt be barred by fine, the law itſelf being her truſtee. Even as to *Choſes* in action this court will preſerve her intereſt, though the huſband may reduce them into poſſeſſion, and though they will belong to him, if ſhe ſurvives. In joint acts over her ſeparate eſtate the court will have the ſame jealouſy as in the execution of a power by a *feme covert*, in which if the huſband joins it has been held void from the preſumption, that ſhe acts *ſub potſtate viri*. Where any thing is given to the ſeparate uſe of a wife, though no intervention of truſtees, the huſband (as now eſtabliſhed, though formerly doubted by Lord *Cowper*) is often conſidered in this court as truſtee for the wife, becauſe it is to her ſeparate uſe. So in marriage-ſettlements if the huſband without interpoſition of truſtees covenants to preſerve money to the ſeparate uſe of the wife, not ſubject to his debts or engagements, as agreements in conſideration of marriage muſt by the ſtat. of frauds be reduced into writing, this court will expect that act to be deſtroyed by an act of as high a nature; if therefore the wife afterward receives and pays the money to the huſband, unleſs there is ſome act in writing to diſcharge the covenant, he will be ſtill conſidered as a truſtee under that covenant. In the deed in 1738 are no words diſcharging Lord *Naſſau* from the covenant; it was only a perſonal diſcharge of the truſtees, not of the money itſelf, from the truſt, being made merely for convenience of the family to call in the money and place it on better ſecurities; had it been intended to put an end to the truſt, that muſt have been expreſsly mentioned in the deed. When a truſtee attempts to diſcharge himſelf of a truſt veſted in him, eſpecially a huſband in a caſe of a wife, every thing muſt be preſumed againſt him; and the court has gone ſo far as not to ſuffer a wife even to give up a ſeparate eſtate, which ſhe acquired before marriage, by any agreement between her and her huſband without the interpoſition of her friends and truſtees conſulted on the ſubject; as was held in *Cowey* v. *Richardſon*. Lady *Iſabella*'s ſuffering Lord *Naſſau* to act, as he did, might all ariſe from the confidence between them, not meaning to part with her ſeparate property to give him power over it, but the managing and receiving the income; for which, though he cannot now be called upon, yet that does not ſhew, ſhe intended to veſt the principal in him. The *memorandum* ſhews that deed to be executed on a miſtake, and ſets the whole at large.

LORD CHANCELLOR.

The only queſtion to be determined on both theſe bills is, whether this ſum is now continuing to be part of the ſeparate eſtate of Lady *Iſabella*, or was ſo at the death of Lord *Naſſau*, for her ſole and ſeparate uſe, or whether by the ſubſequent facts and circumſtances it is now to be conſidered part of the perſonal eſtate of Lord *Naſſau*? This queſtion is proper firſt to be conſidered upon the bill of Mr. *Delaval* and his wife; for though laſt filed, yet as that ſeeks to be relieved againſt the deed in 1750, executed by them, that naturally and in proper order brings on the queſtion in the place; becauſe if they have no right to be relieved againſt that deed, and their acknowledgment of this ſum's being part of the perſonal eſtate of Lord *Naſſau*, it muſt conſequently be accounted for, and ſtand as part of his perſonal eſtate. Their bill muſt be conſidered as the bill of Mr. *Delaval*; for a bill filed in name of huſband and wife claiming in her right is the bill of the huſband. It is therefore in great meaſure a queſtion of fact; and the merits will depend on the facts and the reſult of them in point of evidence. Before I conſider the particular circumſtances, I will lay this down; that it is not to be determined by any one, two, or three particular facts in the cauſe; for it may be admitted, that no one or two facts may be ſufficient to turn the ſcale of evidence: but the queſtion is upon the reſult of the whole, whether they do not conſtitute ſuch an accumulated weight of evidence, as is unſurmountable? I am of opinion, they do; and that there is not ſufficient ground to relieve Mr. *Delaval* and his wife upon their bill againſt the acts they have done. It is proper to conſider under three heads the facts and circumſtances, under which it depends. Firſt thoſe during the life of Lord *Naſſau*: ſecondly thoſe which happened ſince his death and before Lady *Iſabella*'s ſecond marriage: next the acts done ſince that marriage, and particularly the deed in 1750. As to the firſt, taking thoſe facts and circumſtances by ſteps, it was originally upon the marriage in 1731 agreed between them, that this money (then unaſcertained, Lady *Iſabella* having then no right) whatever it ſhould amount to, was to be to her ſeparate uſe, and conſequently would in conſideration of this court be her ſeparate property. They were deſirous (for ſo I muſt take the tranſaction, from what they themſelves have declared) to call it in, and put an end to the truſt. The reſult is, that thoſe two deeds in 1738 import an agreement to receive this large ſum, (the ſeparate property of the wife, and which ſhe might appoint, as ſhe pleaſed, by parol or not), to the uſe of the huſband and wife. That imports an alteration of that uſe, and this by agreement under hands and ſeals of both, a formal Act. It is objected, this was the act of the huſband; that

Bill by huſband and wife in her right is the bill of huſband.

this court is cautious of the property of wives; will examine here, and will not ſuffer to be concerned with huſband without intervention of truſtees. But here is the conſent of the truſtee, who was an executing party. Suppoſing the doctrine true, that a wife is not to be admitted to diſpoſe of her ſeparate property without the intervention of truſtees, (which I do not know to have been ſo determined), here is that aſſiſtance, which, it is inſiſted, ſhe ought to have. Then they further agree to diſcharge, as far as words can go, that truſt to her ſeparate uſe, and declare no new truſt concerning it, but declare a contrary uſe of it. After this no act was done during the life of Lord *Naſſau* by himſelf, or by Lady *Iſabella* (which is more material) admitting, claiming, or inſiſting, that this money or any part was for her ſeparate uſe. On the contrary it was received by Lord *Naſſau*, placed out on mortgages in his name alone without any declaration of truſt, and all acts of receiving intereſt &c. by him. They lived in the beſt harmony; and therefore ſhe might naturally intend to mix their properties together without diſtinction or claim to her ſeparate uſe. The next head of facts and circumſtances are all of the ſame kind, for ſhe acted in the ſame manner, though ſhe had ſeveral opportunities of conſidering this matter; and it is aſtoniſhing, if ſhe had thought, ſhe had any ſeparate claim as to this, that for eleven years from the execution of the deeds in 1738, to her marriage with Mr. *Delaval*, there is no one claim, inſtance or trace of any claim, or aſſertion on her part of this being her ſeparate property or to her ſeparate uſe. Next as to the third head, neither in the ſhort minute or in the explanatory articles is any notice taken of any ſuch claim as to this ſum; and though there are words in both, importing that there was ſomething to her ſeparate uſe, there is nothing relative to this; and there were other ſums ſettled to her ſeparate uſe. The nature of this caſe weighs with me in my opinion, and turns the queſtion. From all the facts very ſtrong evidence ariſes of an uninterrupted intention of both parties to let this go in common as part of Lord *Naſſau*'s eſtate. An objection was properly inforced, that all this might ariſe merely from confidence, not meaning to part with her property to give Lord *Naſſau* a power over it, but to give him the managing and receiving the income, and that it is not ſtrong enough to prove, ſhe intended to veſt the principal in him. I think, it is ſtrong enough. I will admit, for argument's ſake, that theſe acts (though thus uniformly repeated and all with one tendency) are equivocal, and may tend one way or the other, that ſhe meant to give the property to her huſband or only to truſt him with the management and receipt, and then the queſtion may be doubtful on theſe facts: who knew beſt, with what view and intent theſe acts were done? She herſelf, who was a party to all the tranſactions. This then creates the

Whether wife without truſtee may diſpoſe of her ſeparate property.

the ſtrength of the deed in 1750. It muſt have been read to her; nor is the contrary pretended. She had opportunities thereby given her to conſider, whether this money was not her ſeparate property, *viz.* in the recitals, and in the title as well as contents of the ſchedule; yet ſhe, executrix of her huſband, privy to all, and having this notice, freely and voluntarily executes this deed without any ſort of claim. There is no pretence of any compulſion, fraud, or impoſition by any one concerned for Miſs *Pawlet*; for any evidence of that might be conſiderable. There is no application from any other; it muſt therefore proceed, from what was the reſult of the tranſaction in her own mind. The *memorandum*, I am of opinion, cannot be carried ſo far, as is contended. Miſtakes in computation or errors in ſums of money it might be natural to ſet right; but it cannot extend to reverſe and ſet at large every thing done: it can amount only to a general ſubſcription to an account, errors excepted. Whatever be the weight of it, it cannot extend to ſuch a queſtion of right, depending on ſuch a great weight of evidence, in the knowledge of Lady *Iſabella* herſelf, and ſo leave it open to her to reverſe all theſe acts upon ſuch a ſubſcription: it is impoſſible therefore that ſhe, who beſt knew with what view all theſe acts, ſuppoſing them equivocal, were done, could by miſtake let it go in this manner. It is ſaid to be hard to deprive her of ſo great a property upon ſuch facts and acquieſcence: but facts and acquieſcence are material to determine great rights and properties, and many decrees have been thereupon in this court. Where a freeman of *London* has died poſſeſſed of a great perſonal eſtate, has by will divided that among his wife and children; which wife, had ſhe inſiſted upon her ſtrict right, would be intitled to one clear third of it; but ſhe being reaſonable and the family in ſtrict harmony, deſires to have no more, than what is left her by her huſband, and that the reſt ſhould go among the children, has made up accounts and acted on that foot for ſeveral years; and, if ſhe was not executrix, has let the money be applied by the executors of the huſband, and claimed no more; and happens afterward to marry a ſecond huſband; who in her right, or perhaps her executors after her death, inſiſt all this was wrong, that the widow was intitled to one-third, and has not executed any releaſe or parted with her right; and therefore, ſuppoſe ſhe miſtook her right, ſhall have a clear third, one other third as the orphanage part, and the other as the teſtamentary part: the court never has ſuffered that, but always ſaid, that the manner of acting and acquieſcing ſhews her intent, which ſhall bind and conclude, ſo that no account ſhall be afterward. Several decrees have been founded upon that, and thoſe caſes I take to be a very material precedent to the preſent; for this is of that kind: it is taking equivocal acts (I ſpeak upon that foot now) by one handle firſt, by another afterward. Suppoſe

Acquieſcence material to determine property; as where a freeman's widow acquieſces under huſband's will: ſhe is bound thereby.

poſe the freeman's widow in thoſe caſes had executed a deed, as Lady *Iſabella* has, affirming thoſe acts, ſurely then ſhe would not be ſo intitled; and this is ſtrong as that. *Cowey* v. *Richardſon* is mentioned at the bar among other caſes not very concluſive; it is not in print, it was heard at the *Rolls* 11 *July* 1725, and is in the Regiſter's book, *Lib. A. fol.* 491, 492: it was cited to ſhew, this court would not permit a wife to diſpoſe of her ſeparate property to her huſband, who by the truſt is excluded from meddling with it, unleſs it was by her judicial conſent in this court, or by intervention of friends or truſtees. There is no determination of that in this court, that I can find. Several inſtances have been, where wives by acts in *Pais* have parted with ſeparate property to huſbands; and, where there has been no menace or impoſition, it has taken place: and there are ſeveral inſtances, wherein wives concurred to pledge part of their ſeparate property for a debt of the huſband as a ſecurity; the court has never ſaid, that ſecurity ſhould not take place, but held it to ſtand, as a pledge indeed and that the huſband ſhould exonerate; which ſhews, that rule has been laid down too generally. It is true, that the court even as to perſonal property will not give that to the huſband without the wife's own conſent in court: but the reaſon of that is, that the court will make a decree where the huſband and wife are parties, where the wife has a proper ſettlement, to pay to the huſband and wife: for then, if the huſband does not receive it in, it ſurvives to the wife, juſt as they agreed in this deed in 1738 to receive to their own uſe: but where the wife has not had a ſufficient ſettlement, the court will not; but that is, becauſe all ſuits or defences in this court by huſband and wife jointly, where there is no appearance by guardian for the wife, are conſidered as ſuits and defences of the huſband, and therefore will not ſuffer the money to be paid to the huſband on the prayer of his counſel, becauſe the court knows, thoſe inſtructions to counſel come from the huſband, who has the power of the ſuit and defence, and therefore the court expects the wife ſhould attend in court and give conſent. But no certain rule is laid down, that huſband and wife living together on proper terms as they ought, and the wife giving up any part of her ſeparate eſtate to the huſband without compulſion, fraud, *dolus malus*, or ill act by the huſband, this court has ſaid, it ſhould not take place. If indeed the circumſtances required by the truſt, by which the act is to be done, have not been purſued, the court might ſay, it ſhould not take place; but here are no particulars required to the manner of doing it. In *Cowey* v. *Richardſon* the bill was by the executor of a wife againſt the executor of her huſband to have the benefit of a bond executed by the huſband before marriage to a truſtee for the intended wife; the condition of which bond was to permit the wife to diſpoſe by will

It is not determined, that wife may not diſpoſe of ſeparate property to huſband unleſs by conſent in court or interceſſion of friends.

It is done by act in *pais* where no menace or impoſition appears.

May be pledged for huſband's debt, huſband to exonerate.

Money decreed to huſband and wife where a proper ſettlement; not to huſband alone.

Bond by huſband to permit wife to diſpoſe, and cancelled by him, ſubſiſts in point of law, and the benefit of it decreed for her executor.

of 300*l.* which bond had been cancelled by the huſband in his life. The woman was at the time of her marriage a widow, and had children by a former huſband; and made a will after this cancellation of the bond by her ſecond huſband, and by that will gave the 300*l.* part to her ſecond huſband, 150*l.* of it to her ſon and daughter by the firſt huſband, and made that ſon executor. The bill charged, that before the death of the wife the huſband got the bond from her by ſurpriſe in this manner; that the huſband deſired to ſee the bond; that ſhe innocently ſhewed to him, by which opportunity he got it from her, and threw it into the fire, but that ſhe got out the pieces, before they were burned. I gueſs what might have been proved there. The truſtee of the wife was made a defendant to the bill, and was capable of being examined as a witneſs, and he ſwore by his anſwer, that the wife came to him to draw a will, and then told him, that her huſband ſeeming one day uneaſy and diſcontented, ſhe aſked him the reaſon of it, and he told her, he was informed, ſhe had given out that bond to a ſtranger, which might hurt him after her death, and to make him eaſy ſhe brought it down, and put into his hands, and ſaid, he might do what he would with it; and thereupon the huſband tore the bond, and put it behind the chimney; that ſhe, after the huſband had gone, took it up, finding it was not burned; that the truſtee aſked her, whether the huſband took the bond in a fit of paſſion or againſt her conſent; that ſhe anſwered, it was freely done by her, but that ſhe had repented afterward. The *Maſter of the Rolls* delared, that the bond ſubſiſted in point of law, being cancelled by the obligor, not the obligee (for if by obligee it would not) and therefore the plaintiff executor of the wife ought to be relieved, and decreed payment out of the aſſets of the ſecond huſband: but conſider, how applicable that is to the preſent caſe. Here was a bond for valuable conſideration by the huſband to permit his wife to diſpoſe of this ſmall ſum; the huſband appearing uneaſy upon a real or pretended ſtory, ſhe willing to gratify him, and to procure and purchaſe her peace, ſhews him the bond to convince him, ſhe had not parted with it, gave it to him, and told him, he might do with it what he would. There is nothing in this to ſhew that ſhe intended to give up any right in it. He throws it into the fire, and ſhe retrieves it. The benefit of it was decreed upon this foundation, that ſhe ſhewed it was not her intention, and beſide the bond ſubſiſted in point of law. It was a ſudden, inſtantaneous act of the huſband, carrying the act beyond what the wife ſaid or imported. That cannot be applied to a caſe, in which all theſe acts have been done for ſo many years without contradiction, and when the original act to deſtroy the truſt was with conſent of the truſtee, who had the legal intereſt in this money; which deſtroys that, upon which that decree is particularly

larly founded, and therefore is not applicable. Another case shews, how far the court has gone againſt giving relief in a caſe of this kind, depending upon ſubmiſſion and acquieſcence of parties even in a doubtful caſe, or perhaps coming out wrong at laſt, and yet the court will not relieve againſt their own acts, done freely and without fraud; *Smith* v. *Avery*, *Eq. Ab.* 269. which is applicable to this; for it was a clear miſtake as to the right, and much more ſo than this; for here the utmoſt that can be contended for, is, that the acts done are equivocal. Therefore upon the whole together I am of opinion, the circumſtances before the deed in 1750 are ſtrong enough; but admitting them equivocal (for that I greatly rely on) Lady *Iſabella* knew, what was her own intent in all thoſe acts, and could not be miſtaken as to her right or not having a right to this ſum; and therefore there is no ground to relieve againſt thoſe acts. Another conſideration very material is, that this is the bill of Mr. *Delaval*. It might have been ſomething of a different queſtion, if the bill had been by Lady *Iſabella* herſelf, or by her *Prochein Amy* claiming her ſeparate property: not that it would turn the queſtion; but every bill by huſband and wife jointly claiming in right of the wife is the act of the huſband, and the claim is by the huſband though in right of the wife, though ſhe joined for conformity. Conſider what would be the conſequence of giving relief. It is impoſſible to conceive, ſuppoſing Lady *Iſabella* miſtaken in what ſhe did, that ſhe meant to give Mr. *Delaval* ſo large a ſum without mentioning it. Is he then to be taken in this court not only againſt Miſs *Pawlet*, but againſt her to have a right to this large ſum under an *et cætera*? If the court was to open all this upon a miſtake, ſet aſide this deed, and declare this to be part of the ſeparate eſtate of Lady *Iſabella*, they muſt decree this contrary to the intent of any of the parties. This bill therefore muſt be diſmiſſed, and in taking the account under the other bill I declare, that this ſum ought to be conſidered as part of the perſonal eſtate of Lord *Naſſau*.

Note, The caſe of Mrs. *Harvey* had been cited, *Harvey* v. *Aſhley*, *March* 1748, whom *His Lordſhip* held to ratify a ſettlement, made previous to her marriage, and when an infant, by her receiving after coming of age for a year, or year and a half, the jointure ſettled on her.

Anonymous, *July* 28, 1755. Caſe 230.

PETITION by Mr. *Gardner* and his wife that her perſonal eſtate amounting to about 3,000*l.* ſhould be paid to him

out of court, the wife preſent in court conſenting, and deſiring to have it ſo as moſt advantageous to them.

Wife's money not paid to huſband on her conſent in court, though no children, and a propoſal to ſettle.

On the intermarriage of the petitioners in 1747 application was made to the court to take care of this money, and that the huſband ſhould make a proper ſettlement; for which it was directed to the Maſter; before whom propoſals were given in and ſigned both by huſband and wife, by which he was to ſettle an eſtate in *Jamaica* in ſtrict ſettlement: but, before it was abſolutely concluded on, they went to *Jamaica*, where they ſtaid ſix years; and now preferred this petition, there being no children living; and inſiſted on not being bound by the propoſal, the wife ſaying ſhe would be contented with her dower.

Lord Chancellor would not grant it. Though the wife might give up her intereſt in this money, if ſhe pleaſed, yet nobody could conſent for the children, which may be. The propoſal was binding; and if the huſband had died before he came home, and left children, under theſe articles there would be a right to have it carried into execution: and the court has laid hold of a circumſtance, much leſs ſtrong than ſo formal an agreement as this was, to refuſe what is now deſired.

Caſe 231. Wilſon *verſus* Harman, *July* 29, 1755.

Money veſted in *South-Sea* annuities until laid out in land, to go the ſame way. Tenant for life dying in middle of a quarter, no apportionment of the intereſt.

BY articles money was to be laid out in land, and until laid out to be veſted in *South-Sea* annuities, the profits to go in the ſame way as the rent of the land would. The perſon, who would be tenant for life if laid out in land, dies in the middle of a quarter. On petition the queſtion was, whether there ſhould be an apportionment between the repreſentative of the tenant for life and the remainder man?

That there ſhould was cited from *Viner, Title Apportionment, Letter F.* a caſe where it was done by Sir *Joſeph Jekyl* on petition by the adminiſtratrix of *John Holt*, ſon of the *Chief juſtice*, againſt the remainder man, where the reſidue of the *Chief Juſtice*'s perſonal eſtate was to be laid out in land, and until then veſted in theſe annuities to go in the ſame way. †

† See S. C. in Vin. Tit. Executors (U) 79.

LORD CHANCELLOR.

I am ſurprized at that precedent, and much doubt of it, wherever Mr. *Viner* got it; and ſuppoſe it was ſome compromiſe and by conſent. Several inſtances muſt have happened between the tenant for life and remainder man; yet I never heard of ſuch

a rule before. I take it, that theſe dividends go to the perſon, to whom they were due at the time. The truſt is to be laid out in land; what kind of land I cannot tell; and muſt preſume it would be land, on which theſe would be the rent-days of payment. Next to determine ſo I muſt determine, whether upon making ſuch a ſettlement under articles (the court always directing all uſual powers in directing a ſettlement in purſuance of articles to be made) here would not be a power to make leaſes. Therefore as I muſt make preſumptions in order to make this analogy between land and money, I muſt lay the analogy out of the caſe. The queſtion then is, whether this is to be conſidered as the intereſt of money? Where literally ſo, intereſt is ſuppoſed to grow due from day to day to be ſure; and the perſon intitled to the produce is intitled to it to the laſt hour of the day: but that is never held, that I know of, upon the dividends on *South-Sea* annuities and all annuities of that kind. I do not know what authority there is for it; and this happens ſo frequently, that it muſt be known in practice; as to which I will conſult the accountant general, and conſider of it. It would be dangerous to make a precedent contrary to the general practice, which, whatever it is, ought to be broke in upon.

The next day the accountant general ſaid, it was not the practice with them to make a diviſion of the intereſt; and that this was determined by *His Lordſhip* in the caſe of Lord *Leiceſter* in 1744.

LORD CHANCELLOR.

I do not remember that caſe or any other of the ſame nature. When the money is laid, it is purchaſed with the dividends perhaps nearly due at that time; tenant for life immediately draws ſo much out of the dividends, and if afterward he were to do the ſame he would draw at both ends. But beſide, intereſt on a mortgage becomes due from day to day†; mortgagee may call in his money, when he will; and then the intereſt muſt be computed up to the day becauſe no particular time is fixed: but by act of parliament the dividends on theſe annuities are made payable on certain days like rent: therefore it is like rent, and diſtinguiſhable from intereſt of money.

† The firſt year's intereſt is generally made payable half yearly or quarterly portions.

Ex Parte Northleigh, *July* 30, 1755. Caſe 232.

Lunaticks. The bond delivered up, and leſs ſecurity.

PETITION by committee of a lunatick to have the bond delivered up, and a leſs ſecurity given.

LORD CHANCELLOR.

Although he said, it was an uncommon application, he granted it upon the circumstances.

Case 233. Ex Parte Pereira, *July* 30, 1755.

Lunaticks.

PETITION by a committee of a lunatick to have a bond delivered up, and to change the security by giving a greater.

Security changed on giving greater; but this not encouraged, as if he recovers he may have no remedy on a concealment.

Lord Chancellor said, though it had an appearance of benefit to the lunatick's estate, and though he would grant this, yet he gave notice, that he would not encourage applications of this kind, as they might be of dangerous consequence; for suppose the bond delivered up, and there happened to be a concealment of any part of the estate on taking the account, if the lunatick afterward recovered, he could have no remedy for that for the time past, and those accounts frequently are very superficially taken, and cannot be otherwise.

Case 234. Ex Parte Emery, *July* 31, 1755.

Bankrupts. Factor has a specifick lien on the goods purchased by him.

ON a commission of bankruptcy the claim of the petitioners was, as they acted as factors for the purchase of goods, paid the wole money, and drew a bill of exchange, which was protested.

LORD CHANCELLOR.

Notes taken by factor on sale of goods, followed. Ante. Ex parte Dumas, Aug. 9, 1754.

In such case the court has followed the specifick effects in case of a factor or partnership to attain compleat justice; and even where a note is taken by the bankrupt for the money, they followed that note; as was determined in *C. B.* in case of a sale by a factor, and no partnership, who laid out his money in purchase of goods, sent them to his correspondent in *England*, and drew a bill of exchange; the goods have come to the hands of the correspondent here, who has broke; the bill of exchange sent back protested, and the goods here at the time. It has been held to be a specifick lien on those goods, and not suffered to go for other debts until the price for them was paid. That held in several cases, and lately by me in *Crugar* v. *Wilcox*. Let it be directed therefore according to the prayer of the petition.

Ex

Ex Parte Macklin, *July* 31, 1755. Caſe 235.

Bankrupts. Father receives his child's earnings while living with him, and becomes bankrupt; the child by agreement admitted a creditor for a particular ſum to avoid an inquiry: but dangerous to lay down ſuch a rule.

PETITION on the part of *Miſs Macklin* to be let in as a creditor on the eſtate of her father, become bankrupt, for the money he received from the managers of the theatres on her account, offering an allowance thereout for living with and being maintained by him during the time of her acting on the ſtage: that the court is ſo far from giving the father all the earnings of a child, as not to ſuffer a father to be eaſed of the maintenance of a child, who has a fortune, but will let the whole intereſt accumulate, and the father maintain the child, unleſs unable to do ſo.

LORD CHANCELLOR.

I am under ſome difficulty for the ſake of the precedent; for it is true, that the queſtion is the ſame now, as it would have been between the daughter and the father, if he had not been a bankrupt, and could anſwer to an action for himſelf; whether after all this tranſaction the daughter could in an action have recovered againſt the father all this money as money had and received to her uſe? It may be dangerous in *London* to lay it down as a general rule, that if a father having ſeveral children, who earn money, which he receives, becomes bankrupt, every child can come and claim his debt for that money had and received, while they lived together, and were part of his family: that might have a very dangerous conſequence. A father frequently ſends out his ſon to work as journeyman, and his earnings are taken to be the father's. Here the father, mother, and daughter were all actors; and lived together; the father received the whole. It is extraordinary to ſay, that after a length of time this ſhall be all called back becauſe of an act of bankruptcy. I will refer it therefore to the commiſſioners to inquire, how much the father received to the child's uſe, unleſs as to ſo much as was a covenant with the daughter herſelf.

But to avoid the expence of an account it was agreed, that the petitioner ſhould be admitted as a creditor for a particular ſum; but no allowance to be made for maintenance.

Garforth *verſus* Bradley, *Oct.* 25, 1755. Caſe 236.

Baron and feme. Settlement in conſideration of marriage, the wife's preſent for-

ON the marriage between *John Bradley* and *Olave* daughter of *Elizabeth Garforth* a ſettlement was made in conſideration of the marriage, and as well the preſent fortune and portion of the ſaid *Olave* as the covenants therein after contained to be performed, and for

tune, and ſubſequent covenants; one of which was that the mother ſhould give to the wife or any child equal to what was given to the reſt. The mother leaves her a legacy, and by lapſe part of the reſidue comes to her. Wife ſurvives huſband; what he had not reduced into poſſeſſion goes to her repreſentatives by ſurvivor, not to his; there being no contract to give him a certain right.

for ſettling a competent jointure on the ſaid *Olave*. One of the covenants, which afterward followed, was with *Elizabeth* the mother; that ſhe would pay to the huſband 200*l.* as an addition to the daughter's fortune. The other covenant was with the truſtees of the wife, that the mother would for the conſideration aforeſaid in her life or by laſt will give, deviſe, or bequeath, to the ſaid *Olave*, her executors or adminiſtrators, or ſome child or children of the ſaid *Olave*, money or lands equal to what the ſaid *Elizabeth* ſhould give to her other children. The mother by will left *Olave* a legacy, and made her executrix. Part of the reſidue alſo of the mother's eſtate came to *Olave* by the death of the legatee thereof in life of the teſtatrix. *John Bradley* aſſigns over all theſe ſums of money, with a proviſo at the end of the aſſignment, that at his requeſt the aſſignee ſhould reaſſign all thoſe ſums. The wife ſurvived the huſband, and died.

The queſtion now upon exception to the Maſter's report and conſequential directions was between the plaintiffs repreſentatives of the wife and defendant's repreſentatives of the huſband, whether or no by the huſband's dying in life of the wife the ſurplus of her eſtate (whatever it was) that aroſe either by the bequeſt in the will or by the accidental inteſtacy on the death of one reſiduary legatee in life of teſtatrix, ſurvived to the wife or belonged to the huſband?

For defendants it was inſiſted, the huſband was intitled by his marriage-ſettlement as a purchaſer, to whatever came to his wife by her mother. *Squib* v. *Wynne*, 1 *Will.* 378. perſonal goods belonging to the wife are abſolutely the huſband's, whether he ſurvives her or not.

For plaintiffs. *Liſter* v. *Liſter*, 2 *Ver.* 68. and *Cleland* v. *Cleland*, *P. C.* 63. unleſs an expreſs agreement by the wife that the huſband ſhould have the thing, and giving up her contingent right by ſurvivorſhip, a general ſettlement on the marriage without ſuch agreement will not do. Theſe *choſes in action* were not diſpoſed of by the aſſignment; and all this, which was not recovered, goes to repreſentatives of the wife.

LORD CHANCELLOR.

Wife's *choſe in action* ſurvives to her, if huſband reduces not into poſſeſſion by ſuing in his own name.

This queſtion will depend entirely on the conſtruction of the marriage-ſettlement and the covenants therein; for as to the general queſtion it would certainly ſurvive to the wife, if nothing by way of contract altered the caſe; for wherever a *choſe in action* comes to the wife, whether veſting before or after the marriage, if the huſband dies in life of the wife, it will ſurvive to the wife; with

this diſtinction that as to thoſe which come during the coverture, the huſband may for them bring the action in his own name, may diſagree to the intereſt of the wife; and that recovery in his own name is equal to reducing into poſſeſſion. In *Alleyn* 36. in caſe of a bond to huſband and wife during coverture, huſband might maintain an action on the bond in his own name alone, and have judgment in his own name alone, and that that was a diſagreeing to his wife's intereſt, and it ſhould not ſurvive to her, but go to his repreſentatives: whereas if he had brought the action in the name of himſelf and wife, the judgment would be, that both ſhould recover: and then the ſurviving wife, and not the executor of the huſband, ſhould bring the *ſcire facias* on the judgment; and the ſame is held in ſeveral other books. The caſe in 2 *Lev.* 107. is ſomewhat different; for there it is ſaid, the huſband ought to bring the action in the names of both: but in other books the huſband has an election. But that queſtion is out of the caſe here; it depends on the ſettlement. It is true, that if a man marries, and in conſideration of that marriage makes a ſettlement upon the wife by way of jointure, and in conſideration of ſuch portion as ſhe is or may be intitled to, if any thing comes afterward during the coverture to the wife, he is conſidered as a purchaſer of it, and ſhall take it. If on the other hand the ſettlement on the wife is in conſideration of her preſent portion or fortune, without reference to what comes afterward, and the huſband does not reduce it into poſſeſſion, it will ſurvive to the wife in equity as well as by the rule of law; and that, which is laid down in *Packer* v. *Windham*, *P. C.* 412. is right: but this is a particular caſe, and the ſettlement very particular. The conſideration is not barely the marriage and preſent portion, but further alſo the covenants contained therein. If the additional 200*l.* in the firſt covenant had not been paid at the huſband's death, his executors would be intitled thereto. The other covenant is very particular, and differs from the former as to the covenantees as well as to the perſons to whom to be left. Here it is not only to the wife, but alſo to any child of the marriage. How then can I ſay, that by this covenant the huſband is a purchaſer? The mother might have left it to the ſeparate uſe of the wife or to any children of the marriage; which would have been a performance of the covenant; ſo that it is not a covenant inſerted for benefit of the huſband, but of the daughter and iſſue of the marriage. As then ſhe might have left it in this manner, and has left part to her daughter, and the other part has come to her by accident, and no contract to give the huſband a certain right in this at all, it muſt be conſidered on the foot of a general legacy to the wife abſtracted from the contract, not ſuch as the huſband would be intitled to in all events by way of contract: but ſuch as muſt go by the general rules of law and equity by ſurvivorſhip; according to

which, what the huſband reduced into poſſeſſion, will go to his executors; the reſt will ſurvive to the wife. Next as to the aſſignment by the huſband he might undoubtedly have received in this money, if he thought fit; might have releaſed it; or for valuable conſideration aſſigned to a creditor or purchaſer, which would be good according to a caſe before me: but this is the ſlighteſt caſe, that can be, for the court to ſay this, for the proviſo at the end is a plain declaration of truſt upon the face of it; ſo that it amounts to an aſſignment of a *choſe in action*, which in point of law paſſes nothing, and that to create a truſt for benefit of the huſband, who ſubject to the wife's ſurvivorſhip was the original owner; which makes no alteration in this property. This part therefore not got in will ſurvive to the wife, and belong to her repreſentatives.

Another queſtion aroſe as to the intereſt due upon a mortgage, the conſideration of which was reſerved by the decree; whether, as there was an open account againſt the mortgagee, and ſeveral tenders were made of the mortgage-money, intereſt ſhould ſtop from the time of ſuch tenders.

LORD CHANCELLOR.

Intereſt on mortgage not ſtopt but on proper tender and notice. Not upon propoſals to deduct upon open account on the other ſide. Nor coſts.

I do not know, that the court has ever done this. Here is a certain mortgage for the payment of money due on one ſide, and an open account on the other, quite a diſtinct thing and ſeparate from the mortgage. Taking it for granted that upon the account more will be due, than the principal and intereſt of the mortgage will amount to; if therefore it is held, that upon propoſals being made to the mortgagee to deduct, intereſt ſhould ſtop from ſuch time, that would put mortgagees in a bad ſituation: and yet there may be general caſes, in which it may be wiſhed to come at it. But the rule is ſo ſtrict, that, where a certain ſecurity is taken by mortgagees, their intereſt ſhall not ſtop but upon a proper tender and notice; which rules if not obſerved, the court will not ſtop the intereſt; for he has a legal ſecurity for his money; may bring an ejectment and bill for foreclоſure at the ſame time, which the court will not prevent; it would be going a great way therefore in this caſe to ſay, that the intereſt ſhould ſtop. But as he has intereſt on his mortgage to this time, he muſt anſwer intereſt as to the money in his hands, which will be due upon the account. As to coſts, as I am of opinion, and am compelled thereto by the rules of the court, that the propoſals made ſhall not ſtop the intereſt, I do not ſee, how I can refuſe coſts to him.

Mortgagee may bring ejectment and bill to foreclоſe.

But as the mortgagee appeared to have been vexatious, an alteration as to coſts was made.

N. It has been often determined, that if a huſband ſurvives his wife, and does not take out adminiſtration, whoever takes it out, will be a truſtee for him, being the only next of kin.

Mitchel *verſus* Neal, *Nov.* 8, 1755. Caſe 237.

Purchaſer of copyhold not obliged to accept of ſurrender by letter of attorney.
A cuſtom, that it muſt be in perſon, is not contrary to law.

UPON a bill for ſpecifick performance of an agreement for ſale of copyhold lands in *Corſham* in *Wilts* to the plaintiff by ſurrender by the defendant in court, the defendant inſiſted upon doing it by letter of attorney and not otherwiſe, and that he was ready to do ſo. The plaintiff inſiſted upon his doing it in perſon, and entered into proof, that the cuſtom of the manor was, that whoever came to ſurrender, muſt, unleſs in ſpecial caſes of diſability, do it in perſon. By the decree at the *Rolls* a trial was directed as to this cuſtom.

On *appeal* it was inſiſted for defendant, that this iſſue was improper; becauſe, if found for the plaintiff that by the cuſtom of this manor it cannot be by letter of attorney, it would be void in law. Suppoſing it would be good in law, there is not ſufficient proof to direct an iſſue to try the fact. There can be no ſuch cuſtom in point of law; for according to *Combe*'s caſe, 9 *Co.* 75. it is a general law through all copyholds, that a copyholder of inheritance may alien by ſurrender. If ſo, it is incident to his property by the common law, and then it is incident to the nature of it, that he may do it by attorney; and therefore need not alledge a cuſtom for it. Whatever act he can do by himſelf, he can do by attorney, as he may every act in *Pais*. The argument from inconvenience is very ſtrong; and it would be unreaſonable, that a copyholder of inheritance could not ſurrender but in perſon: it is locking up his property; as then it may not be parted with without great inconvenience and upon taking long journeys. It is unreaſonably reſtraining that power, which is given not by cuſtom but the common law: but next if ſuch cuſtom could poſſibly be ſupported, the court would attend to the evidence, and ſee that it was ſtrongly proved, atherwiſe not ſend it to trial, agreeable to the preſent practice of the court of *Exchequer* as to a *modus*; which, though they formerly ſent to be tried on an iſſue, before they determined, whether it was good in point of law, is now varied.

Ante, Richards v. Evans, 26 Oct. 1747. Chapman v. Smith, 17 July 1754. The former practice in Exechequer, of directing an iſſue as to a modus firſt, is now altered; but not in every caſe. Ante, Cart v. Ball, Eaſter 1747.

LORD

LORD CHANCELLOR.

I am of opinion, there is no ground in favour of the defendant to vary this decree. I am in the caſe of a purchaſer of an eſtate, whom no court of juſtice will compel to accept of ſuch purchaſe upon any doubtful title. It is not a queſtion now, what kind of title a man may make in his family, but what kind of title a purchaſer is compelled to take: upon this queſtion, whether a good title can be made, the court in favour of the defendant has directed an iſſue, that if this may be a good title to the plaintiff by letter of attorney, he may accept of it; to which two objections are taken. It is true, that the antient practice of the *Exchequer* in directing an iſſue firſt, before they determined it in point of law (which practice was founded on a ſpecious ground of law, that *ex facto oritur jus*) has been very prudently altered by that court. But I do not know, that in every caſe whatever they do this; that is, that in a doubtful queſtion, doubtful whether good in law or fact, I do not know, that they always determine the *modus* good or not before the fact is tried: but it depends on circumſtances. But what is the objection? I incline to think, it might be ſo as objected: but I cannot ſay that, for the cuſtoms of manors differ. All law of copyholds ariſes from general cuſtom, as Lord *Coke* ſays. This general cuſtom of copyhold may be called the law of the land; yet in ſeveral inſtances that general law is broke in upon. By the general cuſtom a ſurrender muſt be preſented in the next court; but that is varied in ſeveral manors. So in ſome manors as to the number of days; as in a *tenant right* manor in a caſe which came out of the *North*; notwithſtanding that may be perilous and inconvenient, yet the cuſtom of the manor muſt prevail. A ſurrender by attorney cannot be out of court; for that would be for an attorney to make an attorney; which, unleſs there is a ſpecial power in the letter of attorney for that purpoſe, an attorney cannot do. But it is ſaid to be contrary to law: conſider, how all theſe things have ariſen; the manner of acknowledging a fine by commiſſion allowed formerly on the foundation of diſability, is contrary to law now, the law not now requiring the diſability to be ſhewn in the *dedimus* as formerly. I cannot ſay, there is not a manor, in which there is ſuch a cuſtom as this not requiring the diſability. In ſeveral manors there are unreaſonable cuſtoms, though not ſo unreaſonable as that the law will ſet them aſide. It is too much therefore to ſay, that by law there cannot be ſuch a cuſtom. Then how does it ſtand on the proof? I cannot ſay in caſe of a purchaſer, that he ſhould be bound: but I go farther ſtill, and think this rather a direction in favour of the defendant, and that the plaintiff had much more reaſon to complain of it; for the vendor can without the leaſt inconvenience do that act himſelf, and then there is no inſtance of the court's compelling

Law of copyholds ariſes from general cuſtom: yet is often broke in upon.

a perſon to take it by attorney. A purchaſer may be put under difficulties by this means; for the letter of attorney may be loſt; and the party is obliged to prove it and the execution of it: although I allow, that courts of law would make ſtrong preſumptions in ſuch caſe; but why ſhould a purchaſer be put to that? A letter of attorney may be revoked the next moment; that revocation may be notified to the attorney without the purchaſer's knowing it, and then the conveyance would be void, and the purchaſer's only remedy would be by ſuit in equity. Suppoſe, the conveyance was to be made before a maſter under the direction of this court; and the vendor ſaid, he would do it, but would do it by attorney, though living next door to the maſter, and in his power to do it himſelf; this court would not allow that; and if the vendor ſaid ſo to me, I would commit him for not doing it himſelf; for I would not compel a man to accept of a title under a letter of attorney; of which there is no inſtance unleſs a neceſſity appears for it. This therefore is very unreaſonably complained of on the part of the defendant; conſequently the decree muſt ſtand, and the plaintiff have the depoſit.

N. It being ſaid that a power by attorney is void, if the party appears himſelf, *His Lordſhip* denied that; for though the power of a deputy ceaſes in preſence of the principal, it is not ſo of a power of attorney; for a man may appear and act by attorney notwithſtanding he is preſent himſelf.

Williams *verſus* Jekyl.

Elliot *verſus* Jekyl, *Nov.* 8, 1755. Caſe 238.

A Freehold leaſe for three lives was granted to *Elizabeth Elliot*, her executors, adminiſtrators, and aſſigns. She for valuable conſideration makes an aſſignment of the premiſſes, and all her right, title, and intereſt in and to the ſame, to a truſtee to the uſe of her ſon *John Williams* for and during the term of his natural life; and from and after his deceaſe to the uſe of his iſſue lawfully begotten; and for want of ſuch iſſue to the uſe of *Elizabeth Elliot*, her executors and adminiſtrators, during the reſidue of the term.

Leaſe for three lives to A. her executors, &c. A. aſſigns all right to uſe of B. for life, and afterward of his iſſue; and for want of ſuch iſſue to uſe of A. her executors, &c. The whole veſts in the iſſue of B. and iſſue means children; and A.'s executor, who is a ſpecial occupant cannot claim againſt it.

John Williams died leaving a ſon and a daughter; the latter died ſoon after her father at ſix years of age.

The preſent queſtion was between the ſon and *Alexander Elliot* the executor and reſiduary legatee of *Elizabeth Elliot*.

For plaintiff the ſon. The objection made is, that this is to be compared to the limitation of a fee ſimple by a deed, in which *iſſue* is not a word of limitation, but muſt be a word of purchaſe; and conſequently the iſſue, the ſon, muſt take for life only; and then there muſt be a remainder over to *Elizabeth Elliot* to take after his death. But there are ſeveral anſwers thereto. Firſt, this is an agreement for valuable conſideration mentioned, for which *Elizabeth Elliot* parts with this to thoſe uſes: next it is a conveyance by way of truſt, not an uſe executed: there is no doubt of the meaning. She meant to part with, and *John Williams* meant to purchaſe, an eſtate for life to himſelf with a general limitation to his iſſue indefinitely. The nature of this property is a deſcendable freehold, and his heir takes it by deſcription and deſignation as ſpecial occupant, not by deſcent; and though the heir or heir of the body takes it as ſpecial occupant, it is not like a fee ſimple, but goes all along upon the occupancy; ſo would it be, if it was limited to the heirs of the body. But as there cannot be a common recovery of ſuch eſtates, if they could not be barred, there would be a perpetuity; and therefore it has been determined in *Waſteneys* v. *Chappel*, and *Duke of Grafton* v. *Hanmer*, 3 *Will.* 267. that there might be ſuch a limitation of theſe leaſes, and conſequently it might by deed or any common conveyance be aliened, though it was to one and the heirs of his body. Suppoſing then this was a direct legal conveyance to one for life and remainder to his iſſue, it falls not within the rule of law, that one cannot take an inheritance unleſs by the word *heirs*. There are no technical words here, for this is a deſcription of the perſon to take by ſpecial occupancy, not by deſcent. Who are the ſpecial occupants? Firſt *John Williams* for life; next his iſſue indefinitely: there is no rule of law that it might not be ſo limited, ſince according to thoſe caſes it may be diſpoſed of. The limitation over to *Elizabeth Elliot* can never happen, while there is iſſue of his body: if then that cannot be barred, it is void in point of law. As it is an agreement for valuable conſideration, if there is a blunder in expreſſion, contrary to the agreement, this court will rectify it, as in a marriage-ſettlement; and its being for valuable conſideration is a ground to come here to ſet it right. Beſide it is in truſtees, and their truſt is executory; and they are to make an aſſignment of this leaſe purſuant to the ſenſe of the court; which muſt be in proper terms and in an apt manner. Upon any of theſe grounds the plaintiff, now the only iſſue of this marriage, is to have this eſtate abſolutely.

For Alexander Elliot. This is a leaſe for lives, and may conſequently be limited for particular eſtates. The ſtatute of uſes extends to freeholds; and then there can be no reaſon why *John Williams* ſhould be a *ceſtuy que truſt*, and why not an uſe executed. The

queſtion is upon the effect of the words *iſſue*, *&c.* A limitation to one and his iſſue will never in a deed create an eſtate of inheritance. This is to all his iſſue as purchaſers, to ariſe as they ariſe; as to all a man's daughters, it ſplits, as they ariſe. But what eſtate muſt be taken, as the father took an eſtate for life? They took eſtates as jointenants for life; for wherever a freehold without a particular limitation is granted, the party takes only an eſtate for life; and there is no variation as to leaſes for lives or a deſcendable freehold: it is the contrary in a limitation of a term for years, by which the whole is taken. Then according to *Wild*'s caſe, 2 *Co.* and *Taylor* v. *Sayer*, *Cr. El.* 742. and *Cook* v. *Cook*, 2 *Ver.* 545. they take as jointenants and only for life, the limitation to the iſſue giving only eſtates to them as purchaſers, not including iſſue of iſſue collectively as has been argued. It ſtops in the firſt inſtance; nor is the word *iſſue* ever conſtrued ſo far, as the word *heirs* has been, to have a double uſe. This being ſo in point of law, neither will the nature of the eſtate, a limitation for three lives, make any difference. An eſtate *pour auter vie*, limited to one and his heirs, may be given to another for life, and, if it determines during the life *pour auter vie*, ſhall revert to the donor. The ſecond branch of this limitation ſhould have no more power over it, than the firſt: it is not abſolutely veſted in the ſon any more than in the father. Unleſs the word *iſſue ex vi termini* included *in infinitum* collectively, (which has not been the conſtruction of law), it ſignifies no more, than if, having three ſons, they were called by their names. According to what is now inſiſted upon, if the plaintiff died, his executor or adminiſtrator would be intitled to the whole abſolutely contrary to intent; for a power of reverter was intended to herſelf: nor will a court of equity in this caſe go farther than the ſtrict law.

LORD CHANCELLOR.

I am ſatisfied upon the conſtruction of this deed; which conſtruction I muſt make; and that ſuch as is agreeable to the intention of the parties and nature of the eſtate. The firſt conſideration is, that this is a deed of purchaſe. The principle, I ſhall go upon in the conſtruction, is, that words in deeds or wills receive a different conſtruction according to the nature of the eſtates, to which they are applied. It is therefore held in *Forth* v. *Chapman*, (1 *Will.* 663.) and ſeveral other caſes in this court, that the ſame words, that would create a limitation of eſtates or introductory of limitation of eſtates, if applied to real receive one conſtruction, but when in a will or deed relating to perſonal eſtate receive another, *ut res magis valeat*, and that the intent may take place. Here is an aſſignment by way of purchaſe of an eſtate, which is a term for three lives, not created originally as a deſcendable freehold to go to the heir as ſpecial occupant, but to the leſſee, her executors, adminiſtrators, and

Words conſtrued according to nature of the eſtate.

and aſſigns; ſo that the executor of the firſt leſſee muſt take this as ſpecial occupant under the limitation: but ſtill ſuch as would be undoubtedly in the power of the firſt leſſee, whoſe repreſentative that executor is, to deveſt him of every thing, which he muſt take as her executor: that is the nature of the eſtate. Then what is the aſſignment? and the queſtion thereupon is, who took by virtue of the deſcription of *John Williams*'s iſſue, and next what eſtate they took? As to the firſt it is not diſputed, but that both children took by way of deſcription of his iſſue: they would be jointenants; and one dying, the eſtate ſurvived to the other; the ground of which is, that this is not an eſtate of freehold and inheritance; conſequently could not be limited to *John Williams* for life, and then to his iſſue ſo as to unite with his own eſtate as an eſtate of inheritance; and therefore whoever takes by the word *iſſue*, takes as a purchaſer, and conſequently it ſurvives to the child ſurviving. Nay ſuppoſing it had been *heirs of his body*, it would be the ſame in that reſpect, and according to the *Duke of Grafton*'s caſe he would have power to diſpoſe of it. Then taking them as purchaſers, the next queſtion is, what eſtate they took; which depends on the words of this deed? It is inſiſted, that being limited to the iſſue, and no words of limitation added thereto, the iſſue muſt take as perſons deſcribed only, conſequently only the children of *John Williams*; and that they take as if named in the deed, and then only an eſtate for life according to *Cook* v. *Cook* and *Wild*'s caſe; and that it could go no farther in the caſe of an inheritance. In a deed it would be ſo in the caſe of an eſtate of inheritance; but the queſtion here is upon the nature of the eſtate. They appear to know the difference between limiting it for life and in another manner; what was the intent? Was it with an eye to an eſtate tail, as Lord *Hale* ſays? Was it, that none but the children ſhould take, and not the children of the children? I cannot ſay ſo, and that it ſhould then go over to the executors. But it is ſaid, it muſt be ſo by conſtruction of the words and of law. I need not determine now, how it would be of an eſtate *pour auter vie* limited to one and his heirs; for that is not this caſe. Suppoſing the aſſignment had been made to *John Williams*, and all her eſtate, right, title, and intereſt to have and to hold to *John Williams* himſelf, and nothing more ſaid; would *John Williams* have had the whole eſtate and intereſt in the lands under this leaſe? I am of opinion, he would by ſuch aſſignment; and that the executor of *Elizabeth Elliot* could never have claimed it againſt him; for here is an eſtate to her and her executors, *&c.* ſhe grants all her eſtate, *&c.* in it: and yet her executor, who is a ſpecial occupant, claims againſt it. In point of law the whole intereſt for all the lives would veſt in *John Williams*, who is put in the place of her executor. Suppoſing this deed had been to *John Williams* for life, and after his deceaſe to the iſſue of his body lawfully begotten,

and

and it had gone no further; I am of the ſame opinion, that the executor being in her power could not claim againſt her grant. I agree, this caſe differs from that, from what follows; upon which ariſes the principal difficulty. I muſt put a conſtruction upon the words *for want of ſuch iſſue*; and what is the conſtruction? Suppoſe, the plaintiff ſhould die leaving iſſue; I agree, that iſſue could not by virtue of that limitation to the iſſue take the eſtate; for *iſſue* here is not to be conſtrued collectively, but iſſue in the firſt inſtance. Conſider then, what conſtruction the court muſt put upon the words *in default, &c.* and that was the reaſon, I laid it down at firſt, that words muſt be conſtrued according to the nature of the eſtate to which they are applied; and I conſtrue them to mean, in caſe *John Williams* has no children, then to her, her executors and adminiſtrators; and that was the real intent of the parties, as I take it, to convey to her ſon for life; if the ſon had children, they ſhould have it abſolutely; if not, that it ſhould come back to her executors. If the court is at liberty to conſtrue thoſe words *in default of iſſue* in default of children, the whole will veſt in him according to the true conſtruction. I have no doubt at all, but if it had been a plain aſſignment by her during the term to *John Williams* without ſaying more, he would have the whole in him.

The Juvenile Warrior.

OR

LAB ΓE

A

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Younger Children.

Deviſe to younger children of his ſon, to be paid at twenty-one; veſted in thoſe born at the death of teſtator. 83

Portions for younger children under a ſettlement; the father provides otherwiſe for one, intending 10,000*l.* each for the reſt. They are confined to that, and are not alſo to claim an equivalent for the other's ſhare out of the proviſion made. It would be otherwiſe if they had no other ſatisfaction. 123

Grandmother under a power creates

A TABLE of the Principal Matters

by deed a term to commence after her death, to raise money for younger children, with power to the father to appoint; if there are no children, to her own executors. A younger son become eldest is excluded. *Page* 198

Eldest son unprovided for by collateral relations, is considered as a younger. 203

A latitude of construction is allowed to the words *younger children*. *Page* 210

Such as are not head of the family, take not the estate. *ib.*

The capacity is to continue until the time of payment, whether the power of appointment is executed or not. *ib.*

See Power, Settlements before Marriage, Will.

FINIS.

To the BINDER.

☞ *By Mistake there are two Sheets marked* 6 S. *therefore there is no Signature* 6 T. *The Catch-word will direct which is to be placed first.*

FH
MVSEVM
BRITANNICVM